The

Arbitration Journal

"STANDARD" ARBITRATION

MOTION PICTURE INDUSTRY

LABOR-MANAGEMENT PROBLEMS

ARBITRATORS' OPINIONS

CANADIAN-AMERICAN TRADITION

REVIEW OF COURT DECISIONS

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THE ARBITRATION JOURNAL

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The Canadian-American Arbitration Tradition and the Spirit of Andrew Carnegie*

Joseph E. Johnson

President, Carnegie Endowment for International Peace

THE history of the Carnegie Endowment for International Peace is inseparably linked to arbitration, for if it had not been for arbitration there would not have been a Carnegie Endowment for International Peace.

Andrew Carnegie, from the first days when he began to turn his attention to public affairs, which he did so magnificently back in the 1880s, became interested in the problem of finding ways to settle disputes by peaceful means, and before very long he became keenly interested in the efforts of the 1880s and 1890s to establish effective arbitration treaties between the United States and other countries.

It is interesting that in the letter in which he conveyed the funds for the establishment of the Carnegie Endowment, Mr. Carnegie referred proudly to the fact that he had had the honor to present a delegation from the British House of Commons to the President of the United States in 1887 in connection with a proposal for a treaty of arbitration.

Mr. Carnegie's interest in arbitration was so great that he helped to establish, and in fact gave the palace for, the Permanent Court of Arbitration at The Hague, as well as, of course, the palace for what is now the Pan American Union at Washington. And, in that same letter of 1910, he mentions President Taft's proposal for an arbitration treaty which would cover all issues, including questions involving national honor—a proposal made in New York earlier the same year—in a manner to suggest that Taft's proposal was at least

* From an address delivered in New York at the dinner in honor of Hon. Brooke Claxton, Minister of National Defense, Dominion of Canada, March 30, 1951.

in part responsible for his decision to give the funds for the establishment of what is now known as the Carnegie Endowment for International Peace.

So it is true to say that the Endowment probably would not exist if it had not been for the interest of its founder in arbitration. Nor was Mr. Carnegie alone in this interest among the three principal collaborators who brought the organization into being. Mr. Elihu Root through his activity in the field of arbitration strengthened the growing tradition of the Western world for the peaceful settlement of international disputes.

This tradition had grown largely out of that document which occupies such an honored place in the annals of arbitration, the Jay Treaty of 1794. In that treaty Jay attempted, with the cooperation of Lord Grenville of Great Britain, to deal, by means of arbitration commissions, with four of the knottiest problems in relations between the United States and Great Britain, some of which affected Canada.

One of those commissions successfully determined which of the many rivers between what is now Maine and what is now New Brunswick was truly the St. Croix referred to in the Treaty of 1783.

Another dealt with what was almost commercial arbitration. This commission was charged with settling, by arbitration techniques, the debts which Americans owed to British merchants from pre-revolutionary transactions.

John Jay, that distinguished citizen of New York, and Grenville started something. They started what may fairly be called a new technique for the peaceful settlement of international disputes, a technique whose use has grown over the years, which was signalized, of course, in The Hague Court, and which it would have been unthinkable to omit from the provisions of the Charter of the United Nations.

Those two gentlemen started something else. They set a pattern in Canadian-American relations.

The relations between our two countries have not always been untroubled; witness such incidents as the "Battle of the Windmill," the Confederate raid on St. Albans, Vermont, in 1864, and the Fenian expedition in 1866. Nevertheless, Americans and Canadians can rightly boast of their 136 years of peace.

We tend to give the credit largely to the fact that we have had an unfortified border between us throughout that period, beginning with the Rush-Bagot Agreement of 1817. But the border is not,

after all, the sole cause. The practice of arbitration begun by Jay in the Treaty of 1794 deserves at least as much credit for the relations between the two countries as any other single thing, for it has become through the years almost a habit.

There has been a whole series of arbitrations between the United States and Canada. There was an arbitration of the Maine boundary. Unfortunately, the indignant citizens of Maine did not think well of the arbitration award of 1831, and the United States rejected it, only to yield more territory in the Webster-Ashburton Treaty of 1842. There were attempts to arbitrate the fisheries question. The fur-seal issue was arbitrated. The Alaska boundary was arbitrated successfully, although under circumstances of which not all Americans are proud. And in 1911, forty years ago, the final settlement of the fisheries question, which had plagued friendly relations between Canada and the United States intermittently since 1783, was achieved through arbitration of the differences at the recently established Permanent Court of Arbitration at The Hague. The first President of the Carnegie Endowment, Mr. Elihu Root, contributed notably on the American side to the success of that arbitration.

So it is that the United States and Canada travel the road of cooperation whose foundations are firmly laid in a determination to settle disputes by arbitration and other peaceful means. It is a road which, it may safely be predicted, they will continue to travel for a long time to come.

We of the West, especially we of the Americas, have made it a part of our way of life to search for ways to settle our disputes peacefully. We have had the will to search for techniques, whether these disputes were personal, commercial, in the field of labor relations, or between governments even over grave matters of national interest. Our arbitration agencies take for granted the will to settle disputes peacefully, and their whole work is devoted to that cause. On another plane, the representatives of the various governments of the Americas strive continuously for the settlement of disputes by peaceful means.

The understanding of 1940 between the United States and Canada is an example of what a spirit of mutual trust and cooperation can achieve. This, perhaps the greatest and closest alliance in the world today, is based upon a press release which was not even signed. But of course such an arrangement does not work merely of its own accord. Alliances are rather like marriages—they have to be renewed every day in order to be successful.

In the West we have the will to cooperate, the tradition of compromise. Unhappily, however—and this is one of the most disturbing features of the world situation today—there would seem to be no sign of a desire on the other side of the Iron Curtain to settle disputes by peaceful means. Experience at the United Nations has shown that the Soviet attitude toward arbitration, toward mediation, toward settlement of a dispute, resembles that of a man who, having a horse to sell for which he wants $100, while the prospective purchaser wishes to pay only $50, believes that a fair bargain is struck if he receives $100.

There is indeed very little evidence in the Kremlin of that spirit of accommodation which is basic to the things we stand for in international relations. One of the great unsolved questions in the world today is whether it is possible in fact ever to obtain real acceptance on the other side of the Iron Curtain of the ideal and the practice of peaceful settlement on the basis of an impartial determination of the facts.

We must hope that one day this great tradition will be accepted, for otherwise the outlook for the world would seem to be gloomy indeed.

Labor-Management Conference at Yale University

"Labor-Management Relations and Arbitration in an Arsenal Economy" were discussed at a conference at Yale Law School on May 5, 1951, sponsored by the Labor Law Section of the Connecticut Bar Association, the Yale Law School, the Labor-Management Center of Yale University and the American Arbitration Association. The program included addresses by John K. Dunlop, Harvard professor and public member of the newly appointed Wage Stabilization Board, on "Wage Stabilization and Arbitration", Frank Graham, former Senator from North Carolina and Defense Manpower Administrator, now U.N. representative in the Kashmir dispute between India and Pakistan, on "Man Power Distribution and Control", and J. Noble Braden, AAA Tribunal Vice President, whose address is printed elsewhere in this Journal. The conference was particularly notable for the representation of Connecticut management and labor as participants. Among the commentators were the attorneys John I. Ely of New Haven, William Gordon of Hartford, William J. Larkin, II of Waterbury; Daniel Baker of Bridgeport, and Norman Solot, of the Connecticut Federation of Labor, A. F. of L.; Neil Chamberlain of Yale University, Harry Shulman of Yale Law School, and Robert L. Stutz of the University of Connecticut; also Hiram S. Hall, Vice-President, Bigelow-Sanford Carpet Co., and Mitchell Sviridoff, President, Connecticut State C. I. O. The chairmen of the three sections were Wesley A. Sturges, Dean, Yale Law School, E. Wight Bakke, Director, Labor-Management Center, Yale University, and Harry Silverstone, Chairman, Labor Law Section, Connecticut Bar Association. A questionnaire was distributed at the Conference, the answers to which offer some guide to the general trend of thought on some of the important arbitration problems. Executive's Labor Letter of May 24, 1951 reports on the answers as follows:

> "*Figure named by management men as a reasonable per diem fee* for an arbitrator averaged $71.73, compared with $57.65

named by labor. The arbitrators themselves thought $60.21 reasonable. Participants who weren't identified with any of these groups were way off—would have held the fee down to $37.50 a day. The average fee named by all the conferees came to $64.34.

√ This survey ties in to some extent with the conclusions of a study released in the summer of 1949 by the University of California. In that survey, too, management and the arbitrators supported a fee higher than that named by the unions. The figures in the California report, however, were generally higher than those set at the Yale Conference. The average for grievance cases was $71.94; for contract cases, $88.10. While very few contracts set the per diem fee for an arbitrator, those that do show considerable variation; they range from $25 to $75 a day.

The conferees went on record as favoring limitation of number of study days spent examining evidence and writing an award. Three-fourths of the entire group backed the limitation idea. The arbitrators, however, were least inclined to go along with this. A little more than half of them agreed, compared with two-thirds of management and nine-tenths of labor.

In setting the actual ratio of study days to hearing days, the unions were again on the side of economy. 61% of the labor people favored one day of study to one hearing day, compared with 47% of management. One-third of the union group thought the ratio should be two days of study to one day of hearing, while 40% of management found this proportion wise. Only 13% of management and 6% of the union men felt that more study time was needed.

Silence of the arbitrators on this point was significant. These men, who presumably know best about what is involved in going over evidence and preparing a decision, declined to answer the question on the ratio of study to hearing days. One reason, naturally, is that generalizations are almost impossible. A case concerning wage incentives, for example, may require much more time than a dispute over a discharge for insubordination.

Labor's desire to keep the costs of arbitration low was reflected in the answers to the questions on reasonable fees

and on the amount of time needed by the arbitrator to study a case. An increasing number of contracts require the union to share the costs of arbitration, and some require the losing party to foot the entire bill.

The participants in the conference were strongly in favor of having a single arbitrator rather than a tripartite board settle grievance cases. The idea was endorsed by 79% of management, 86% of the union people, 92% of the arbitrators, and all of the other conferees.

The story was different on wage-rate disputes. In these cases, the percentage favoring a single arbitrator dropped; 60% of management, 54% of labor, 67% of arbitrators, and 20% of the other conferees thought that one arbitrator was advisable. While the decline in percentages favoring one arbitrator didn't turn the vote in favor of a three-man board, it reflects the thinking that the special knowledge of partisan representatives is advisable in wage disputes.

But the swing was sharply in favor of a tripartite board in disputes over new contracts. Almost two-thirds of the entire group backed the tripartite setup. The arbitrators alone remained unconvinced of the wisdom of a three-man board. They still favored the single arbitrator even in those disputes where each party's desire to get satisfactory terms may best be served by having management and union men right on the arbitration board.

The problem of a deadlock in a tripartite board found the conferees in agreement that the impartial chairman should then be given power to make the decision by himself. Almost 9 out of 10 members of the entire group supported this idea—particularly the arbitrators and the labor people. Incidentally, giving the impartial chairman authority to resolve a stalemate often is cited as an argument in favor of a single arbitrator. If one man is to have the power to write the decision anyway, you might just as well appoint one arbitrator in the first place, so the thinking goes.

A surprising result revealed by the AAA survey is that most conferees said their first choice as arbitrator would be a part-timer, a man who has some other occupation or profession, but

derives a substantial amount of income from arbitration. In fact, they preferred a man who serves only occasionally to one who makes arbitration his full-time job. They made no distinction between part-time and full-time arbitrators as second choices, but favored the occasional arbitrator as third choice. Is this an indication of distrust of the professional full-time arbitrator?

The relation of mediation to arbitration also was covered. To the question of whether an arbitrator should try to mediate a dispute arising under the grievance procedure of a contract, 67% of the group said no. The arbitrators were most opposed to this concept; 92% of them were against it, compared with 60% of management and 55% of labor.

The reaction of the group as a whole was just about the same to a query about mediation in cases involving a new contract; 68% opposed it. The arbitrators, however, were less united in their opposition to mediating a contract dispute. Union opposition increased."

National Academy of Arbitrators. At its Fourth Annual Meeting in Chicago, on March 29-31, 1951, W. J. Reilly, International Harvester Corporation, and Ben Fischer, United Steel Workers of America, spoke on "The Impact of Arbitration on Collective Bargaining and Industrial Relations" and Ralph T. Seward on "Arbitration in the World Today." Panel discussions were held on "Arbitration and Stabilization" and "Arbitration in disciplinary cases."

The newly elected officers of the Academy are: David L. Cole, President; Paul N. Guthrie, Edgar L. Warren, Harry H. Platt, and Theodore W. Kheel, Vice-Presidents; George E. Strong, Treasurer; Carl R. Schedler, Executive Secretary. The Board of Governors of the Academy are: Maxwell Copelof, I. Robert Feinberg, Gabriel N. Alexander, John Day Larkin, William Ray Forrester, Sidney A. Wolff, George W. Taylor, Clarence M. Updegraff and Dudley E. Whiting.

A. C. Croft, President of the AAA, and J. Noble Braden, its Tribunal Vice President, were guests of the Academy at the meeting.

What Can the Motion Picture Industry Arbitrate?

Robert L. Wright*

In the current welter of proposals for a new motion picture arbitration system, more attention seems to have been paid to form than to substance. The purpose of this article is to answer the question raised by its title and that question brings us sharply up against the 1950 anti-monopoly decrees under which the principal elements of the industry now operate. Those litigated decrees are themselves a product of the failure of the arbitration system setup by the 1940 consent decree. Before considering what a new system can do, it may, therefore, be profitable to look at what the old one failed to do and to try and understand the reason for its failure.

The old system failed primarily because it was founded upon the proposition that the licensing discriminations implicit in control of the principal theatre circuits by the principal film distributors should not be touched by any arbitrator's award. It was frankly established with the hope, later proved vain, that by taking care of the minor complaints the major issue posed by the Government's suit might be avoided. Because of numerous restrictions intended to preserve the status quo ante 1940, it was virtually impossible for an exhibitor to improve his run status by arbitration under that decree. The bulk of the work of the tribunals was concerned with intervals of clearance which could have no decisive effect on the competitive position of the complainants or the respondents.

These clearance complaints were, in the judgment of this writer, handled effectively within the limits imposed by the decree. As a clearance adjustment system, the arbitration system functioned well but it did not and could not, with the best administration conceivable, remove the restraints on the competitive freedom of independent exhibitors that the major film distributors had imposed. When,

* Former Special Assistant to the Attorney General of the United States.

after nearly five years of experience, this fact became apparent to the Government, it brought to trial the main issue, divorcement of the film distributors from their theatre circuits, and ultimately prevailed.

The industry, as a result, is now adjusting to the new alignments created by the final judgments in the Government's suit, which are themselves long range plans, still in the process of execution. One basic purpose of these judgments is to compel changes in the existing run structures in the principal cities, which had been established for the benefit of the large circuits. It is, therefore, inconceivable that any arbitration system may be reestablished at this time which would preserve existing run priorities. Any attempt to fix by arbitration the playing position of affiliated or independent theatres would at once run afoul of the existing judgments, which require a non-discriminatory, picture by picture negotiation of run and clearance in all competitive situations, with due consideration for the merits of the theatres involved.

What then may be arbitrated? Perhaps the most effective use that could presently be made of arbitration would be a fair and expeditious disposition of the claims for damages resulting from past anti-trust law violation by the major film distributors and the principal theatre circuits. A lawyer spokesman for the major distributors recently complained to a congressional committee that his clients were threatened with disaster by the large number of treble damage suits filed under Section 4 of the Clayton Act, which gives a private remedy to persons injured by anti-trust law violation. If the distributors believe that such suits will result in their paying more than just compensation for injuries actually sustained, they should take the lead in establishing arbitration tribunals in which an injured exhibitor may seek an appropriate damage award instead of prosecuting a treble damage suit.

Congress has created a liability for damages to the injured exhibitors which has somehow got to be discharged by those who inflicted the injury and who profited handsomely in the course of inflicting it. In my judgment, the expense and hazards of treble damage litigation are so great that many injured exhibitors would have a better chance of recovery in an arbitration proceeding than by litigation. This would be especially true if the award could represent the amount of damage actually inflicted, perhaps with interest from the date of the injury, instead of the mandatory treble dam-

age figure provided by Section A of the Clayton Act. One unfortunate result of the mandatory aspect of that provision is that judges and juries are reluctant to award any damages in cases where the violation is not a flagrant one, because they regard an award of treble the amount of such a loss as unjust enrichment.

In order to conform a damage arbitration system to the purposes of the Clayton Act, it would be necessary to empower the arbitrator to award punitive damages where he found that a flagrant violation caused the injury, but a figure treble the amount of the actual damage, might well be used as a ceiling instead of as a mandatory award. Any award of attorney's fees, also mandatory under the Clayton Act, might also be left to the discretion of the arbitrator and based upon consideration of the nature of the violation and the financial circumstances of the complainant.

I do not pretend to know whether the foregoing proposals would interest any of the film distributors. They have developed an elaborate treble damage defense machinery which functions with a high degree of efficiency. Despite an occasional large verdict in the District Courts, the net final result may well be that the distributors are paying out a smaller proportion of their total liability in treble damage litigation than they would have to pay in arbitration awards under a system such as that proposed above. The suggested arbitration system would certainly result, however, in a much smaller proportion of the total cost of satisfying these claims being eaten up by legal expenses.

Another field for arbitration is provided by the recurring problems of decree compliance. I see no reason why most of the complaints now directed to the Justice Department could not be dealt with effectively by arbitration. If it were understood that the resulting award would be no bar to contempt proceedings, which may be brought only by the United States in any event, I should suppose that the Department would have no objection to the arbitration of such complaints. The parties would, of course, be free to agree among themselves as to the terms of the submission and those terms would necessarily define the issues and the scope of the award. The award could either be one of money damages for the injury sustained or simply a finding as to the merits of the claim of violation. The arbitrator would have no power to make an award controlling future conduct but his award could, by stipulation, be given the status of an agreed statement of facts on which to prosecute or defend a claim

for equitable relief under Section 16 of the Clayton Act. Litigation of such claims for injunctive relief could be greatly simplified and spurious claims could be quickly eliminated by such arbitration. It would provide the industry with a speedy and economical means of dealing with disputes that are bound to arise with increasing frequency in the course of applying the Government decrees to the discriminatory run and clearance patterns which still persist in many areas.

All of this discussion presupposes that arbitration is a better method of resolving motion picture industry disputes than litigation. If the parties can be limited to those directly involved and the multiple attorney representation of defendants with similar interests, which plagued the old system, can be avoided, a sound case may be made for the proposition that arbitration is often a quicker and cheaper method of obtaining a just result than litigation. That case must also be based upon making the arbitration machinery available without any limitation on the scope of the issues to be decided or the relief to be awarded, except those which are imposed by the applicable anti-trust laws, including the existing decrees.

There is no reason why the parties to any industry dispute should not be able to arbitrate any question they want to arbitrate and agree to any form of award which does not conflict with the applicable law. Access to a new system of arbitration should, therefore, not be conditioned upon advance submission to limitations designed to protect the existing status of any element in the industry. Such limitations spelled the doom of the old system and no new one could survive them.

That part of the industry which visualizes arbitration as a means of stabilizing the admittedly chaotic conditions which now prevail in certain areas does not understand the cause of the chaos. The acute discomfort which exhibitors suffer as a result of the distributors' exploitation through competitive bidding of new competition created by the Government decrees cannot be alleviated by arbitration. Neither exhibitors nor distributors can have an industry which is at once stabilized and highly competitive.

The industry is now more competitive than it has been since its infancy because the principles of the Sherman Act have been given practical effect by the Government's anti-trust suits. Those of us who helped prosecute that litigation naturally believe that the present competition has produced a healthier industry, rendering better public

service than the old monopoly pattern could ever provide. But those who differ with us on this point ought to understand that the stability that went with the old centralized control cannot be recaptured by a new system of arbitration. The breakup of that control could not be avoided by the old arbitration system and no new system of arbitration can provide a new system of industry control.

This does not mean that the facilities of the old system should now be disregarded. The American Arbitration Association, the Motion Picture Appeal Board and the individual arbitrators acquired a knowledge of the workings of this industry which ought to be utilized in some manner by any new system. The industry now has available for perhaps the first time in its history, a substantial body of arbitration experts who combine a special knowledge of the industry with freedom from the prejudices necessarily attaching to those who are a part of it. Perhaps the most efficient system would be one in which the judging were left solely to such arbitrators and the advocacy handled for each party by an expert industry witness with special knowledge of the subject matter in issue. As a member of the legal profession, I hesitate to advance the view that lawyers should be excluded from the arbitration process but experience does suggest that unless they play a more limited role than they do in the courtroom, the benefits from the informal procedures characteristic of arbitration may become largely illusory.

To sum up, the industry can solve, by arbitration instead of litigation, most of the disputes that currently plague it if it wants to do so. But no arbitration machinery exists or can be created, short of legislation exempting the industry from the anti-trust laws, for restoring the kind of stability the industry had before competition reared its ugly or pretty head, depending on which side you view it from. There is, therefore, no point in continuing to talk about a new system of arbitration without considering what is to be arbitrated and what the awards shall be. Until the industry faces up to that problem, arbitration will continue to be something that everyone applauds but no one embraces.

Inter-American Commercial Arbitration *

Phanor J. Eder

President, American Foreign Law Association

SPEAKING of commercial arbitration, the great Latin-American jurist, Dr. Antonio Sanchez de Bustamente of Cuba, said a few years ago:

> "The advantages of this procedure over litigation are self-evident. In the first place, it speeds the solution of commercial disputes which would be delayed by the complexity of the subject-matter and by process in the courts. Secondly, and for a like reason, it is less costly. And thirdly, it permits a liberal application of the rules and principles of equity which mitigate the rigors, extreme and sometimes unjust, of the strict law in a manner which the judges of the ordinary courts cannot do."[1]

The early common law did not favor arbitration, but the hostility of the courts has disappeared, and in nearly all common-law jurisdictions, by statutory enactments, the full validity of an agreement to settle future disputes by arbitration is now recognized.

Arbitration has become current practice among merchants for both domestic and international controversies.

Legislation in Latin America has lagged. Only Colombia has enacted a satisfactory statute.[2] In many countries an agreement to arbitrate future disputes is still held null and void. In others the legal requirements as regards the form of the agreement (e.g., the

* Reprinted, with permission, from the author's "A Comparative Survey of Anglo-American and Latin-American Law" (New York University Press, New York, 1950).

[1] As quoted in Eder, "Arbitraje Comercial Inter-Americano," 2 Tercera Conferencia de la Federacion Interamericana de Abogados (hereinafter Tercera Conferencia) 101 and 103 (Mexico, 1945).

[2] Law of February 25, 1938, which gives validity to the arbitration clause.

requirement of a public instrument) make it too troublesome or costly, and there are other legal obstacles to its effectiveness.[3] It has been my privilege to work with the Inter-American Commercial Arbitration Commission since its foundation in 1934, and I cannot fail to avail myself of this opportunity to recommend the advantages of arbitration in general and, more particularly, in foreign trade and to ask co-operation to carry through the statutory reforms that have been proposed and that are so badly needed.

[3] See Eder, "Arbitraje Comercial Inter-Americano," 2 Tercera Conferencia 101 (Mexico, 1945). See also for the Inter-American Commercial Arbitration Commission, Domke and Kellor, "Western Hemisphere Systems of Arbitration," 6 U. of Toronto L. J. 307 (1946).

Arbitration In Legal Periodicals

"The abatement of Contract for Arbitration by Subsequent Acts of the Parties" was the topic of an article by Harold Korzenic in New York Law Journal of March 26, 1951, p. 1066, which was followed up in a further correspondence by Samuel Press and Manuel Taxel, N. Y. L. J. of April 13, 1951, p. 1344, and by Louis Flato *ibid.*, May 1, 1951, p. 1578; a note on "Competency of Arbitrators" in St. John's Law Review, vol. 25, p. 337 (1951) deals with the *Amtorg Trading* case, 277 App. Div. 531, 100 N. Y. S. 2d 747 (digested in this *Journal* 1951, p. 53); the *New Jersey Bell Telephone* case is commented on in a well-documented article by Bernard Cushman "Compulsory Arbitration in Action," Syracuse Law Review, vol. 2, p. 251 (1951); the Detroit Lawyer (vol. 19, No. 2, p. 19, 1951) published an article "Arbitration—one of the More Expert Agencies of Democracy" by Ethan Prewitt, Chairman of the Arbitration Committee of the Detroit Bar Association; George W. Taylor wrote on "The Voluntary Arbitration of Labor Disputes" in Michigan Law Review, vol. 49, p. 787 (1951), and on "Collective Bargaining in a Defense Economy" in Monthly Labor Review 1951, p. 140; Morton Singer dealt with "Labor Arbitration: Should it be Formal or Informal" in Labor Law Journal vol. 2, p. 891 (1951), and with "Use of Legal Rules of Evidence," *ibid.* p. 185; the participation of lawyers was considered in an article by E. R. Hackett "The Practical Side of Contract Disputes and Arbitration," Labor Law Journal, vol. 2, p. 119 (1951); the May issue of the same periodical carried on p. 329 an article by H. X. Summers and B. Sarnoff "The Labor Board looks at Arbitration"; "Jurisdiction of States over Labor Relations affecting Interstate Commerce" is dealt with in an article by Ralph J. Geffen in Wisconsin Law Review 1951, p. 158.

"Standard" Arbitration — What It Is and What It Does *

Thomas A. Morgan

Chairman of the Board and President, The Sperry Corporation

In a world torn with dissension, distrust, and conflict, American arbitration has marched steadily towards its goal—the amicable settlement of disputes and differences. Great as are the remaining differences, on at least one continent of the world there is unity for the defense of democratic institutions through this most democratic of processes, arbitration.

Arbitration began in 1787 when the Chamber of Commerce of the State of New York set up the first privately administered tribunal of business men and became the first administrator of arbitrations. Since that time, more than 500 American trade and commercial organizations have settled their differences by arbitration. Among them, the New York Stock Exchange requires its members to arbitrate all disputes arising between members. The great American textile industry, including cotton, wool, silk and rayon, submits all of its disputes to arbitration. The building and construction industries, through the Institute of Architects, the Building Congress, and Contractors Associations settle their disputes by arbitration. Many union contracts—in fact, two-thirds of them—require management-labor disputes be submitted to arbitration, when all other amicable methods fail.

It remained, however, for the American Arbitration Association to gather up all the loose strands of arbitration and unite them into a national system, serving all of these independent groups, and operating as a laboratory of experiment and experience for the advancement of arbitration as an American way of life and of thought. Out

* Reprinted, with permission, from Standardization, monthly publication of the American Standards Association, Vol. 22, p. 144 (May, 1951).

of the 50,000 or more disputes settled in its tribunals, representing all types of busines and industrial problems, there has emerged standard arbitration that is coming to be known the world over for its integrity, competence, speed, and economy.

It is timely, therefore, to inquire: What is this standard arbitration? How was it established and how did it become acceptable in practice? How far may standardization be carried without impairing the freedom of the individual to settle his controversies by a method of his own choice and by means of judges whom he chooses?

In standard arbitration, the specifications are set by rules of procedure and are observed through the good faith of the parties or by trade discipline. The standard arbitration is processed under rules, in tribunals that are privately established and maintained by commercial and financial institutions. They offer excellent examples of the self-discipline and self-help which industry supplies voluntarily in the maintenance of commercial and industrial peace.

A standard arbitration is one where the participants are reasonably certain that whatever the subject matter, and wherever the arbitration is held, certain basic principles or procedural ingredients will remain constant. It is an arbitration where the variants in procedure or practice are reduced to a minimum, thereby relieving parties of the hazards of uncertainties, delays, high costs, or frustration in obtaining a settlement. A standard arbitration is one where the principles and procedures are fixed in advance and continue without change or interruption by common acceptance usage for the settlement of the type of dispute to which they are adapted.

The standard arbitration is fixed by rules and not by law. It is based upon the experience and research of the group that prescribes the specifications. It is intimately related to the customs of the trade and often grows out of their necessities. Such, for example, is the arbitration involved in a comparison of samples with shipments when questions of quality are involved. But arbitrations need not necessarily be restricted to a trade. They may be fixed by general rules which apply to all types of controversy. Such for example, are those established by the Rules of the American Arbitration Association and under its Code of Ethics and Procedural Standards for Labor-Management Arbitration.

Acceptance of a standard arbitration, established by rules, is voluntary. Members of trade organizations voluntarily accept it when they use the uniform contract of the trade containing an arbitration

clause which refers to specific rules. Disputants generally accept the standard arbitration set by the American Arbitration Association when they refer matters to arbitration in accordance with its Rules. A standard arbitration is, therefore, accepted not only through reference under rules but by means of written contracts which name all of those rules.

How and why has a standard arbitration become necessary in modern business transactions and in present day labor-management relations? In its early history, when parties engaged in business knew each other personally and had direct contact, the hazards of disputes were less acute. So, also, the references to arbitration were more casual and intermittent. The issues were simpler, being confined in many instances to questions of price, quality, or time of delivery or condition upon arrival. Arbitrators, chosen by the parties, were usually friends or known business associates whose experience and competence could be gauged in making their selection.

Today, this is changed. The written contract passing between men unknown to each other has replaced the verbal order. The uniform contract, found best adapted to a trade, has replaced the haphazard instrument drawn at random. The insertion of arbitration clauses in these contracts brings arbitration into constant and steady usage in place of intermittent references. The issues referred to arbitration have greatly expanded in kind and complexity. And arbitrators are frequently unknown men chosen from panels, instead of from a narrow circle of friends of the parties.

A Standard Necessary

The wide acceptance of the practice of committing contracting parties to the arbitration of future disputes that may arise under the contract, at the time of making it, and when a dispute does not seem imminent, has made a standard arbitration not only possible but necessary. Owing to the frequent use of uniform contracts containing arbitration clauses, arbitration has become big business. It is fair to the lawyer and to the arbitrator; it is economical and time-saving to the parties; it is essential to business operation generally and as such necessitates standardization.

No less profound changes have occurred in the field of labor relations. Not many years ago, an arbitration clause in a collective bargaining agreement was a novelty; the use of rules was thought inappropriate and the partisan arbitrator chosen as an advocate, with

only one member of the board a neutral, was thought ideal for bargaining purposes. Today, two-thirds of the recorded collective bargaining agreements contain arbitration provisions, references to rules are increasingly frequent, and the tri-partite board is no longer the unquestioned best method of proceeding. The trend toward standardization is unmistakable, for labor arbitrations are now also big business.

What are the elements or processes of arbitration that rules or codes seek to standardize? Of first importance is time. Without fixed periods of time within which arbitrators are to be appointed, hearings arranged, notices issued, and awards made, just to mention a few of the items of time, any arbitration may be frustrated through negligence, evasion, or default on the part of a party who is reluctant to proceed under the contractual obligation to arbitrate. It is therefore, important to ascertain what is "reasonable" or "due notice", how much time should be allowed for certain obligations to be performed and to fix definite periods of time that permit of no equivocation. Failing their observance, alternate methods of procedure must be provided, subject also to standardization of periods of time within which performance is required. An examination of types of rules indicates that fixing periods of time has become one of the most important elements of standardization.

Of hardly less importance is the standardization of the order of the proceeding. It has been found that a smooth-running arbitration requires that consecutive steps be taken, in accordance with a pattern. It has become apparent that certain practices are identified with the initiation of an arbitration, that others are essential to the appointment of arbitrators, and that still others are necessary to the arrangement of hearings and getting the matter properly before the arbitrators. If these steps be taken out of order, or by too divergent methods, confusion or frustration result. Hence, rules provide for an orderly procedure that leaves no loopholes for escape from the consequences of commitments to arbitrate.

Terms Clarified

Perhaps we should go back a moment and examine the terms used in arbitration and see to what extent standardization can or has taken the confusion out of their usage. Time was (and still is in labor arbitration) when any form of pacific settlement was called arbitration, when any kind of compromise or recommendation was termed

an award and when the arbitration agreement was a hazy instrument. The arbitrator himself might be a mediator, conciliator, negotiator, or a combination of all three. The standard arbitration has clarified these terms. Under rules that undertake such clarification, the arbitrator is appointed to make a final decision on the merits of the case, according to the facts or testimony presented, and his findings are in final written form which the parties agree in advance to accept. His is a judicial not a bargaining function and his brethren in arbitration tend to regard the arbitrator who acts otherwise as not maintaining the prestige and integrity of arbitration.

Rules Synchronized

The synchronization of rules is a further undertaking in standardization. For example, in the commodity exchanges belonging to the British Federation of Commodity Associations while each commodity group operates separately for its own trade under a uniform contract, the arbitration procedures are startlingly alike. As a further illustration, the Rules of the American Arbitration Association, the Inter-American Commercial Arbitration Commission, and the Canadian-American Commercial Arbitration Commission have been so synchronized as to be interchangeable in principle and process. In whatever country the party arbitrates, under whichever rules he selects, he is assured of similar guaranties. In the United States thousands of arbitrators in hundreds of communities apply rules, with a minimum of variants, whether the issue involves a commercial, civil, or labor dispute. In no other country has such progress been made in the standardization of the practice generally of arbitration.

Not so very long ago, it was thought that the utmost freedom should be allowed parties in making an arbitration agreement, that its form was immaterial, and that it required great flexibility. It used to be that submissions to arbitrate were carelessly written on backs of envelopes or on scraps of paper and were indifferently signed by the parties. Notices used to be given by telephone or other casual communication. Written demands under clauses, stating the issues, were unknown; awards were issued haphazardly or orally. It was all delightfully informal, but hazardous, because under attack in the courts, the loose ends frayed out. The opportunities for evasions and frustrations have convinced parties that standard forms of agreement or standard forms of clauses that contain the essentials but no surplusage, offer greater security of performance.

Today, printed forms, containing specific data and requirements, are widely in use and give uniformity, certainty, and surety to the proceeding. Use of them saves parties and arbitrators worry, time, and economic loss. Twelve standard forms in use by the American Arbitration Association have systematized a proceeding without in the least affecting adversely its flexibility, speed or low cost.

Cost Rates Set

At first glance, it seems impossible, if not impracticable, to standardize the cost of an arbitration as there are so many imponderables in the situation. Nevertheless, progress has been made in sufficient degree to demonstrate its feasibility. The American Arbitration Association has found it possible to set a limit on arbitrators' fees, to regulate expense acounts, to set rates for mileage and hotel charges, to keep stenographic rates within bounds, and in other ways to begin the standardization of costs.

The foregoing offer illustrations of some of the procedural processes that lend themselves somewhat readily to standardization. It is in the field of behavior that the real difficulty arises, for here no norm has been established to which to key specific standards. What, for example, should be the requirements for admission to a panel of an arbitrator? Setting a standard involves questions of character, of competence, of experience, of attainments in public or private service. How shall these be reduced to operating terms to determine if a person should be appointed to a panel?

Consideration also is required, according to a fundamental principle of arbitration, that the arbitrator be impartial. This implies not only unbiased action in an individual case, but that he has a tolerant and open mind and one not given to prejudice or preconceived opinions. But how determine this in estimating his fitness for a panel? The American Arbitration Association has undertaken to establish standards for admission to its Panel, but is far from being satisfied that they are sufficiently scientific to assure the desired result in every case.

Essentials Specified

Commercial arbitration is far in advance of labor arbitration. It is possible to draw commercial arbitration rules to uniform specifications and to have them incorporate basic requirements for operational efficiency. They recognize that unless certain essentials are included in

the specifications, an arbitration may fail in its functioning even as a machine may fail if its basic specifications are neglected. These specifications are set by technical experts who, out of their knowledge and experience, know the requirements. It is possible to set commercial qualifications by trade or callings and to find experts to fill these requirements. There is considerable agreement upon who can qualify as experts in these categories. It is possible to find agreement upon who are the outstanding leaders in any given field of industry or in a profession.

But where is the agreement upon what constitutes a good labor-management arbitrator? What qualifications should he have to admit him to a panel? There is wide divergence upon the advantages of having rules of procedure for labor arbitrations. One school of thought holds that he should be a chameleon, having power to change from mediator to conciliator or arbitrator as circumstances seem to require and that rules cramp this facility. Many collective bargaining agreements include, in the name of arbitration, provisions that provide only for fact-finding or recommendations, or that favor the exhaustion of every other remedy before arbitration is applicable. Some agreements neglect wholly to provide for arbitration under Rules. And yet just as surely as commercial arbitrations have moved over the centuries toward standardization, labor arbitrations are following the same pattern for only in that pattern lies security of performance.

It is, however, in the field of human behavior during an arbitration that the task of standardization becomes really intricate. For here the problem becomes one of furnishing a guide for conduct. The principle says that the arbitrator shall be impartial and that he must decide according to his conscience. But in the heat of argument, in the presence of conflicting testimony, incomplete records and defective memories and competitive tactics, how shall the arbitrator be sure of his impartiality and that his conscience is freely at work? And sometimes the parties seek to confuse rather than to help him.

Nothing daunted, however, a group of more than 100 industrialists and professional men, two years ago, tackled the problem of human behavior in labor arbitrations and a similar group of lawyers tackled the same problem in commercial arbitrations. They have now presented a set of Standards for Commercial Arbitration and a Code of Ethics and Procedural Standards for Labor-Management Arbitration which are receiving general acceptance throughout the country. They

are unique in that they set standards for parties and arbitrators and administrators of rules so that cooperation is assured and one group of participants, such as arbitrators, is not rendered helpless by lack of cooperation from another group as, for example, the parties.[1]

Administrators' Rules

In these specifications for behavior, requirements for administrators of rules have been included. As an administered process, arbitration is nearly as old as the United States. Since the Chamber of Commerce of the State of New York became the first administrator of a private tribunal, hundreds of organizations have undertaken to formulate and administer rules—each according to the concept of its own trade or its organization. The specifications in these new codes undertake for the first time to establish a few basic principles for the guidance of all administrators so they also may help and not hinder fair behavior in an arbitration.

Trained Men Needed

Arbitration is at the point where its demand for trained men to serve as arbitrators is a paramount need. It no longer suffices that they know the subject matter; they must more competently know the process itself, for the issues involved are of a gravity hitherto unknown. For example, in a time of preparedness for defense, internal peace and security from labor disturbance is a grave necessity. But the training of men to serve as arbitrators, or of parties to appear in tribunals lies still in the nebulous area of conference and discussion. There has been no general acceptance of a recognized method of instruction, of the source material to be used in such instruction, of the equipment or knowledge teachers of arbitration might require. There is no history of arbitration. And, yet, without these, progress in the knowledge and application of arbitration must be vacillating and tenuous and ineffective. Here, also, progress is being made in putting forth standards for training in arbitration.[2]

How far should standardization go lest it stifle individual initiative and elasticity? In a time of comparative international peace, this question might be answered one way by imposing limitations upon

[1] Texts are available on request to the American Arbitration Association.

[2] *Arbitration as an American and International Way of Life—A Project for Teaching Arbitration,* available from the American Arbitration Association.

standardization; in a time of national emergency, when any waste motion in the settlement of disputes becomes vital to defense, the answer might well be another way. Certainly in the chaotic state of world affairs, standardization assumes a new importance and could go much further without destroying its voluntary self-regulatory nature. Just as it has been found that uniformity in rules, codes, and clauses has not changed the basic character of arbitration nor affected its flexibility, so the further advancement of standardization may influence free people to make arbitration a way of life and an instrument of wide social service. Certainly it can do no harm to be more concerned with time limitations, more specific about costs, more intelligent about training, and more concerned with expedition in these perilous times.

Actors' Equity Association, a branch of Associated Actors and Artistes of America, affiliated with the American Federation of Labor, has, since its establishment, advanced the use of arbitration as a builder of good will in the theatrical industry. Its earliest standard form for contracts included an arbitration clause. In the beginning there were many arbitrations on all kinds of grievances but today Actors' Equity advises that, due to general acceptance of the principle, settlements are so frequently obtained that it is rarely necessary to invoke the clause. Actors' Equity wrote the American Arbitration Association recently: We are very happy that, for twenty-five years this Association and yours have had such pleasant relationships, and that the relatively few disputes over Equity's contract have been so amicably settled through the method of arbitration. We look back with pride upon what we have been able to accomplish with you in forwarding the cause of arbitration."

Canadian-American Commercial Arbitration Commission

A new impetus is being given to commercial arbitration in Canada by the Canadian Section of the Canadian-American Commercial Arbitration Commission, which is in the process of reorganization. Representatives of the Canadian Bankers' Association, the Canadian Bar Association, the Canadian Chamber of Commerce, the Canadian Exporters' Association, the Canadian Importers & Traders Association, the Canadian Manufacturers' Association and the Canadian Council of the International Chamber of Commerce participated in a conference held at Montreal on May 8, 1951 and decided on an educational campaign for the extended use of commercial arbitration by Canadian businessmen and on the reorganization of the panels of arbitrators. Questionnaires have been prepared to ascertain the actual status and need for commercial arbitration in Canada and will be circulated by the various commercial and professional organizations of Canada. Among the questions are those concerning the use of arbitration in the settlement of commercial disputes with foreign businessmen, the frequency of this use, the satisfaction with arbitration and other methods of settlement, and the reasons for dissatisfaction (unsatisfactory arbitrators, inadequate machinery or procedure, unfamiliarity of parties with arbitrable procedure, failure of one party to honor awards). There are further questions on the practice of incorporating arbitration clauses and on trade associations providing for arbitration facilities.

The Arbitration Journal will report on the progress of the Canadian Section's endeavors and hopes to give a complete report on the result of the questionnaire.

Current Problems in Labor-Management Arbitration

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LABOR and management during the past 15 years in this country have established a most remarkable record for settlement of controversies by peaceful processes—a record of which every American may well be proud. If that pattern could be extended to the people of the world, in every walk of life, a will to peaceful settlement of all problems would be created that no government could resist.

From articles appearing in the daily press and from remarks of many radio commentators one might believe that labor-management peace is a dream, for of course there is little of news value in the peaceful behavior of human beings. Yet, every day, across the country labor and management sit across a table and amicably resolve controversies that might otherwise cause strikes, lockouts or work stoppages.

During the past year, delegations from a number of foreign countries, including many representatives of labor and management have visited the offices of the American Arbitration Association and sat as observers in the labor arbitration tribunal. These observers, from the Chief Justice of Japan to the youngest representatives of foreign labor unions and management groups, have been amazed and impressed by voluntary arbitration in action; by the attitudes of union and management in the conduct of the proceedings and by the records of the voluntary performance of the decisions of the arbitrators. They have been equally impressed by the ingenuity of unions and management in devising ways and means of settling their differences.

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This very ingenuity, however, has led to some confusion regarding the nature and scope of the processes used and the intent of the parties when they provide for the use of voluntary arbitration. Foremost among the problems which have arisen and which are today the subject of much discussion are the scope and function of arbitration, the cost of arbitration, the selection of the arbitrator, the type of arbitrator or board to be used, whether arbitrators should write opinions, should opinions and awards establish precedents, a growing tendency to use courts to frustrate arbitration, an unfriendly attitude in the courts to labor arbitration, and, of course, what will be the effect of the Wage Stabilization Board on voluntary arbitration?

The most basic question is, of course, what is the scope and function of arbitration in labor-management relations? The problem arises because of the loose use of the term "arbitration" to describe almost any process other than collective bargaining used to settle labor-management disputes. History of the labor movement shows that in earlier days the term "arbitration" was used even to denote a conference for bargaining. Today, the impartial chairman, the umpire, joint boards, fact finders, mediators, conciliators, are frequently termed "arbitrators."

It has been suggested that to be concerned with this use of the terminology is to be technical and legalistic. The important matter is the settlement of controversy. But the company or the union considering the use of some method for the determination of a dispute, or settlement of a grievance under a collective bargaining agreement, should know what they are agreeing to and should be assured that the term mentioned will provide the process that they desire.

Perhaps a national conference should be held and a nomenclature devised and definitions agreed upon so that no question would arise as to the functions of the process and the scope and authority of the board or person selected to settle or determine a controversy. There is no disagreement over the fact that the parties have the right to prescribe any method whatsoever upon which they mutually agree for the determination of their differences. The problem arises solely because of the lack of definiteness as to what the term arbitration means. There should be no such ambiguity. Arbitration is not new—we have had arbitration laws for centuries. The Lex Mercatoria, Chapter 15, published in 1622, has the following statement on arbitration:

"The second mean, or, rather, ordinary course, to end the

> questions and controversies arising between merchants is by the way of arbitrament, when both parties do make choice of honest men to end their causes, which is voluntary and in their own power, and therefore called arbitrium, or free will, whence the name arbitrator is derived: and these men (by some, called good men) make their judgments by awards, according to equity and conscience, observing the customs of merchants, and should be void of all partiality, more or less, to the one and to the other, having only care that right may take place, according to the truth, and that the difference may be ended with brevity and expedition: . . ."

It will be noted that in 1622 as it is in the arbitration law of today, arbitration is voluntary, the parties choose the arbitrators, the arbitrators make their judgments according to equity and conscience, observing the customs of the parties and that the arbitrators are to be impartial.

In modern dictionaries, whether general or legal, arbitration is defined as "the hearing and determination of a dispute submitted by the parties to a person or persons chosen or agreed to by them". Note again, it is the determination of a dispute—not a compromise settlement. It may also be interesting to note that in international law, arbitration is described as the application of judicial methods to the settlement of international disputes.

Why is there any question as to meaning of arbitration? The question arises only because the term is used so frequently without regard to its meaning. It is suggested that a disagreement between labor and management presents an opportunity to promote better relations between the two—an opportunity to whom? An opportunity to some third person to prescribe a new relationship? Possibly yes—if that is what the parties desire; but why not give a name to that process and stop calling it arbitration, thereby giving a dissatisfied party the opportunity of going to court under the arbitration law, claiming that the arbitrator had exceeded his authority by altering, amending or changing the contract between the parties and asking that his award be set aside.

In settling controversies regarding the terms of contracts, we generally find conciliation, mediation, fact-finding (with and without recommendations), and arbitration. In settling disputes arising out of the contracts, we find impartial chairmen, umpires, joint boards and arbitrators. The processes of conciliation, mediation and fact-

finding are simply steps in the process of negotiation. In no instance is the finding of the third party binding on the parties. They may accept or reject any solution that is offered; but in arbitration, the parties are bound by the determination of the arbitrators. In the settlement of disputes arising out of the contracts, disputes concerning the interpretation of the terms of the contract, the findings or decision of the third person is almost always binding on the parties.

In the contract-making field, the parties usually execute a submission agreement setting forth the questions submitted to the arbitrators and generally the controversy is submitted to a board. The parties expect that their representatives on the board will continue to negotiate the terms of the contract up to the making of the award. Accordingly, the third arbitrator is a middle man who, in the executive sessions is often called upon to mediate between his partisan colleagues in order to obtain a decision. In this field also, parties frequently request the arbitrator to act as a mediator. It, however, takes a most competent arbitrator to be careful that he does not commit himself in mediation to the extent that he will be unable to render a judgment, if the mediation fails.

In the grievance procedure arbitration, an entirely different situation exists. The parties have, through negotiation, agreed upon the terms of their relationship for a fixed period of time; and when a dispute arises, it concerns the operation of the contract and a disagreement as to the meaning of its terms. The arbitrator is called upon to interpret the agreement on the evidence submitted by each party, bearing upon their practices and customs. It has been suggested that a collective bargaining agreement is only a skeleton and that arbitration offers an opportunity to give substance and amplification to the agreement. That was undoubtedly true in many instances a dozen years ago; but in view of the experience of union and management in negotiating contracts and in living under them for that length of time, there is an ever-increasing belief expressed by representatives of both management and labor that the terms of the contract should not be varied by an arbitrator. Most contracts now include definite statements that arbitration is for the sole purpose of interpreting and applying the specific provisions of the agreement and that the arbitrator may not modify, add to, or change the conditions of the contract.

In January of this year, following two years of effort in which

representatives of management, labor, and many of the leading arbitrators of the country participated, a Code of Ethics and Procedural Standards for Labor-Management Arbitration was prepared. It was unanimously approved by the group of more than 150, who had the opportunity to review and comment on at least half a dozen drafts of the Code. It was unanimously approved by the National Academy of Arbitrators; it was adopted and approved by the Federal Mediation and Conciliation Service; and it has been adopted and approved by a number of state boards (Massachusetts, Louisiana, California, Oklahoma, Connecticut, South Carolina and North Carolina).

It would be well to look at the Code and see what the standards are which have received such widespread approval in regard to the scope and function of arbitration. The opening sentence of the Code reads as follows: "The function of an arbitrator is to decide disputes." It further provides that it is the arbitrator's duty to "adhere to such general standards of adjudicatory bodies as require a full, impartial and orderly consideration of evidence and argument, in accordance with applicable arbitration law and the rules of general understandings or practices of the parties." It is stated that "he should not undertake to induce a settlement of the dispute against the wishes of either party." Of course it also provides that "if, however, an atmosphere is created or the issues are so simplified or reduced as to lead to a voluntary settlement by the parties, a function of his office has been fulfilled." The important point is that unless the parties specifically and mutually desire him to depart from the function of an arbitrator, he may not do so.

It has been suggested that judicial arbitration means legalistic arbitration. Nothing could be farther from the truth. Arbitration is the opposite of legalism. If many of those who are writing on arbitration and labor-management relations would but take the time to examine the history of arbitration and read the decisions of the courts, it would not be necessary to discuss whether rules of evidence are to be used or whether the arbitrator must be legalistic and technical, since the courts have held from the beginning that arbitrators are not bound by rules of evidence. Arbitrators should not be legalistic and technical. Their proceedings may be as informal as the parties desire. The purpose of arbitration is to allow parties to have their disputes settled without the formality and legalism of litigation, and to use the experience of men in the trade, with full knowledge of the customs and practices, to judge and determine the questions submitted for decision.

Recently a number of contracts have provided for the appointment of a mediator after the last step in the grievance procedure; and only when mediation is tried and has failed is the matter referred to arbitration. This offers an interesting suggestion of how to separate the mediation process from the judicial one.

The important point is that the parties know the type of process to which they are agreeing; and accordingly, care must be taken to differentiate between the term arbitration and other methods used to settle controversies between labor and management.

The problem regarding the scope of arbitration in labor-management relations might be summed up by asking: Is arbitration a process through which either party to a collective bargaining agreement may change or add to the conditions agreed upon? Collective bargaining implies a discussion, a trading; and when the word agreement is added, it obviously means that the parties have completed their trading, their legislating, and have arrived at a mutual understanding. The legislating is over, and arbitration is provided as the judicial arm of their self-government.

It has been suggested that arbitration should be used to implement and amplify a collective bargaining agreement because the right to strike has been given up. But obviously, the right to strike on grievances has been given up not because of arbitration but because the strike has become an unsatisfactory and uneconomic process. Neither unions nor management can afford strikes and lockouts over day-to-day grievances. With 75,000—90,000 collective bargaining agreements in the country, only by the use of a method to determine judicially the differences that arise concerning the interpretation and application of the agreement can collective bargaining be effective. Collective bargaining as the legislative section and arbitration as the judicial section is the finest demonstration of the American democratic process and the American way of life.

The cost of arbitration is of some concern, but the costs are within the control of the parties. In some of what may be termed public interest cases, generally public utility matters, very substantial fees have been paid—rarely to experienced, professional arbitrators but to political appointees, one-time arbitrators. The experienced and professional arbitrator is concerned with costs and, expecting to continue in the field, is willing to serve at fees that are reasonable and well within the amounts the parties are freely willing to pay.

A recent survey of the University of California at Los Angeles,

disclosed that management, unions, and arbitrators reported that the average fee in grievance cases was $72 per day and in contract-making cases $88 per day.

Expenses of arbitration are increased by a number of factors. Inadequate preparation of a case consuming many days of hearing, results in a mass of unnecessary evidence which in turn requires the arbitrator to use many additional days to study and digest it in order to write his opinion and award.

In some instances a separate arbitrator and proceeding is required for each grievance. The suspicion that when an arbitrator has to decide a number of grievances, he will try to balance the decisions, is unfounded and an unfair reflection on his integrity. If there are any such arbitrators, they should not be permitted to determine even one grievance.

In work assignment cases, time studies are frequently necessary and much expense is incurred. Investigation of a number of such cases discloses that arbitrators have been unable to make a decision without time studies because neither the company nor the union is able or willing to submit the necessary data upon which the dispute may be judged. Engineers generally decline to submit in evidence the data upon which work assignments have been based and without the data how can any arbitrator make a determination.

Thorough preparation of every case will do much to reduce the expense of arbitration.

Another item that adds to the cost is the preparation of opinions to accompany awards. How often are detailed opinions necessary? One distinguished arbitrator has adopted the custom of making his award and only writing an opinion when requested by either of the parties. An additional expense will be incurred if an opinion is required. It is my understanding that since he has adopted that practice, rarely has he been asked to write an opinion.

The use of the services of the established agencies—the Federal Mediation Board, the state Boards, or the American Arbitration Association—will do much to assure reasonable costs for arbitrators. The standards established by such agencies are for fees of from $25 to $100 per day, except in special cases and in contract-making arbitrations. In any event, fees should be known in advance and the parties thus enabled to select an arbitrator to fit their purses and the nature of the dispute.

All professional arbitrators are willing to serve in special instances

without fees in order that no small union or employer will be deprived of a "day in court".

Other items of expense to be considered are the cost of counsel and a stenographic record. Cases well prepared and presented by a competent attorney may represent a saving when compared to the time taken due to inexperience. Many arbitrators find that much time is saved by counsel trained in the assembly and presentation of evidence, providing of course, that counsel is skilled in labor-management practice. Representation by counsel is a matter for individual consideration, just as is the question of whether a stenographic record is required.

Not infrequently the cost of a record is greater than the fee of the arbitrator. Many arbitrators keep notes and do not require a record. When, however, an arbitrator is required to write a long opinion including a summary of the position of the parties, a record is probably needed. Experience indicates, however, that in the large majority of grievance arbitrations, stenographic records are not necessary.

The heart of any arbitration is the arbitrator. Is good judgment being used in his selection, or is the choice being based on rumor and prejudice? Over the past several years the number of those active or attempting to be active in the arbitration field has diminished considerably, but there is left a good reservoir of capable, experienced men. Many of these, however, men of character, ability, and long experience, are frequently black-balled and subject to public abuse because of the disappointment of the loser in an arbitration. Labor and management have both been guilty of considerable unfairness in that regard. The most unfortunate result is that the condemnation is public and severe and the vindication practically never heard. A number of outstanding arbitrators have been asked to serve again by the very industry—labor or management—that has condemned them; but this selection, which is a real vindication of the arbitrator, is given no publicity and his reputation may have been permanently damaged.

Among the articles that I have reviewed recently was one that complained that arbitrators had granted many wage increases in a particular industry, which the writer believed were unjustified, and had raised the level of wages beyond what should be reasonably expected. An analysis was made of the increases in average hourly earnings in that industry as compared to the U. S. Bureau of Labor Statistics Report on the same question in its list of selected industries.

The figures showed that in the complaining industry, the increases granted were considerably below those experienced in the other comparative industries.

The established agencies, which I have previously named, are well equipped to submit lists of competent and experienced arbitrators and are willing to give information concerning their experience and qualifications. Just as those agencies will aid in the control of costs, they also can be relied upon to aid in finding the most suitable arbitrators, and the use of their services rather than the haphazard selection of names out of a hat will promote better arbitration and better arbitrators.

Space does not permit a discussion of whether the permanent arbitrator is to be preferred over the ad hoc arbitrator, whether the impartial chairman is to be preferred over the umpire, whether an impartial board or a single arbitrator is better than a tripartite board.

But, there is substantial evidence that in grievance arbitration there is a growing tendency to use a single arbitrator, and in contract arbitration the tripartite board is still preferred. In the California survey of 70% of management and unions indicated preference for a single arbitrator as compared to a tripartite board for grievance cases.

Much of the concern with the correct use of arbitration is due to a tendency which has developed rapidly in the last several years of going to court to challenge the arbitrability of a dispute upon which arbitration has been demanded under a clause in a contract or to try and have an award set aside. Such action, to say the least, does little to improve the relations between the employer and employees and the union and management. It will be suggested in reply that the contract should be observed and neither party should be permitted to use arbitration to extend unfairly, limit or change the agreement of the parties. Why not arbitrate the question?

A recent contract in Connecticut offers a suggestion. It provides that "Should Company or Union raise the question of arbitrability of an issue, the arbitrator will decide if the issue is arbitrable." Surely that is a better approach than a long drawn-out legal fight with several appeals, while the dispute still lives engendering acrimony, ill will and discord in the day to day relations of the parties.

It appears that in many recent decisions, as demonstrated by the dissenting opinions in numerous instances, judgments have been rendered without due consideration to the advances made in labor-

management relations. It has been suggested that a different measure has been applied to the interpretation of arbitration agreements than that which has been used in interpreting commercial contracts generally. The language "no one is under a duty to resort to arbitration unless by clear language he has so agreed" and a requirement that the obligation to arbitrate must be "perfectly expressed" is contrary to the progressive attitude demonstrated in other contract determinations where the court has sought to discover and enforce "the directing purpose for which a contract was made". It is especially enlightening to consider the statements of the Court of Appeals of New Jersey in setting aside the decisions of the State appointed boards in determining the telephone cases and note the unrealistic attitude expressed in those opinions.

Collective bargaining and the use of arbitration to many is a comparatively new process. Disputes which arise in connection with it should be settled by those who are conversant and experienced in the field, rather than determined by restrictive and ancient doctrine.

A more optimistic note may be sounded in connection with a recent decision of the U. S. District Court in North Carolina. A party walked out on an arbitration being conducted in accordance with the arbitration provisions of a collective bargaining agreement. The arbitrator proceeded to hear and determine the matter on the evidence available. The defending party refused to comply with the award but on application to the Federal Court, the Court found that the complainant was entitled to an injunction, requiring the defending party to perform the award. It was obtained under Section 301-A of the Taft-Hartley Act.

We are now engaged in a great effort to protect democracy and the American way of life. We are opposed to regimentation and government control of our daily activities; but in a war or similar emergency special steps must be taken. We must be certain that those steps are necessary and that they do not go beyond the reasonable requirements of the situation. The Wage Stabilization Board has been established, and recently its authority enlarged. In the discussion regarding the enlargement of that authority, much fear was expressed that proceedings before the Board would take the place of collective bargaining and voluntary arbitration.

Today, between 80 and 90 percent of the collective bargaining agreements in this country include provisions for the arbitration of disputes arising out of such agreements, and it would indeed be a

calamity if the voluntarily agreed upon method for the determination of disputes was abandoned and a party to such an agreement was permitted access to a Government Board. It would be a calamity not only to collective bargaining but to the Board itself, for the Board would be so over-run with what might be termed minor disputes that it would not be able to function promptly and properly on major issues.

It has been suggested that only disputes affecting the defense program would be referred to the Board. What are disputes affecting the defense production? Almost any dispute arising in a shop making armament or parts for armaments could affect production. Labor and management are daily referring such matters to voluntary arbitration and they should continue to do so. Only major disputes, disputes over the terms of new contracts and primarily those relating to the wage package, should be referred to and accepted by the Board. If any other course is adopted, the use of voluntary arbitration upon which labor and management have agreed will be displaced by compulsory arbitration which both labor and management have repeatedly resisted.

It is not unusual today to have the terms of new agreements determined by voluntary arbitration and such use should be encouraged.

The Stabilization Board must have the right, of course, to review awards made under voluntary arbitration and submissions or collective bargaining arbitration clauses if such awards affect wage rates. But there is a great deal of difference between the review of such awards and the actual hearing and determination of the disputes. A wide use of voluntary arbitration will ease the problems of the Board and follow the democratic way of life, for which we are re-arming.

The Stabilization Board should refuse to accept any cases arising out of contracts containing arbitration provisions and more important, should make sure that its agents, its personnel, do not intrude themselves into such situations. The Board should also refuse to take wage cases until the parties have honestly and sincerely negotiated and until the full services and capacity of the Federal Mediation and Conciliation Service and voluntary arbitration have been exhausted. That Service can do much to ease the burden of the Stabilization Board and thus afford it the time and opportunity to take care of major matters. Failure to observe the arbitration pro-

visions in collective bargaining contracts and to use the full services of the Federal Mediation and Conciliation Service will impose compulsory arbitration on labor and management. Collective bargaining will be abandoned, voluntary arbitration lost, and Government regimentation imposed. We will be in danger of losing one of the democratic institutions we are seeking to preserve.

North Carolina which has been one of the states not providing for statutory enforcement of future arbitration clauses, enacted on April 14, 1951 a law amending article 4A of Chapter 95 of the General Statute of North Carolina relating to the voluntary arbitration of labor disputes. The comprehensive amendment, to become effective July 1, 1951, provides in sec. 95-36.1 for a Declaration of Policy as follows:

> "It is hereby declared as the public policy of this State that the best interests of the people of the State are served by the prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless of where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the State, while not direct parties to such disputes, should always be considered, respected and protected; and, where efforts at amicable settlement have been unsuccessful, that the voluntary arbitration of such disputes will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the State. To carry out such policies, the necessity for the enactment of the provisions of this Article is hereby declared as a matter of legislative determination."

The scope of article 4A of Chapter 95 as amended is described in sec. 95-36: "The provisions of this Article shall apply only to voluntary agreements to arbitrate labor disputes including, but not restricted to, all controversies between employers, employees and their respective bargaining representatives, or any of them, relating to wages, hours, and other conditions of employment."

The Function of Arbitrators' Opinions

M. Herbert Syme

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What is the Function of the Opinion? What is it intended to achieve?

This is susceptible to a division into: (a) The opinion on terms of new agreements; and (b) The grievance opinion.

Where the terms of a new agreement are written there can be no doubt of the fact that either one of the parties is entitled to an opinion. The Arbitrator writing the terms of a new agreement is legislating; he is developing new rights as contradistinguished to the construction of already acquired interests.[1]

The social and economic norms that he uses in evaluating the approaches of the contending parties may be of as great importance to the employer and the union as his ultimate award. Let me illustrate: On August 22, 1947, a statutory board of arbitration in New Jersey wrote an opinion with respect to holidays. In that case O. David Zimring, General Counsel for the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, requested the granting of holidays for operators. The employer retorted that there was no industry practice to justify the union's request. The board granted two holidays to the operators. Dr. George W. Taylor, the Chairman, writing the opinion for the public members stated:

> "There is not too much industry practice to refer to in the support of this part of the Award, although paid holidays for operators are not a novelty as is shown by Union Exhibit 37. In the judgment of the Board, this particular award recog-

[1] See 325 U. S. 711 (pp. 723, 724), 1945; also M. Herbert Syme, Tri-Partitism and Compulsory Arbitration, Proceedings of New York University Third Annual Conference on Labor, p. 195 (1950).

> nizes an inherent equity in the union case. In each of the other sections of the award, Public Service is brought in line, or partially in line, with what other transit companies are doing. If arbitration in the utility industries were based strictly upon maintaining an established industry pattern, static working conditions would obtain. The award of two paid holidays to the operators recognizes, in a small way, that new ground can be ploughed through arbitration as well as through strikes."

This was in 1947. Since then the granting of holidays has become much more extensive practice in the Transit Industry. In the particular company involved, six holidays are now recognized for the operators and paid for on a more liberal basis than that granted by the Taylor Board.

The award is archaic. The opinion, however, has become part of the folklore of the industry. The value of an opinion in disputes fixing the terms of a new agreement lies in the fact that:

1. The parties are anxious to learn what the arbitrator's thinking is. If his thinking should run counter to their philosophy, then they should reject him. In recent years there has been a good deal of talk about a black list. Certain industries and industry associations and certain labor unions are reputed to have been circulating a black list of arbitrators. The list was held out to be an analysis of past awards of the particular arbitrator with a prognosis as to what he might do in the future. That is both unfair and inaccurate. It is one thing, however, to reject an arbitrator because of a past award and it is quite another to reject him because of his thinking which is reflected in his opinion.

2. The parties in collective bargaining and in the presentation of arbitration cases adopt one line of reasoning as opposed to another. They have voluntarily selected a person in whom they have faith. If arbitrators consistently reject their line of reasoning they may very well have to explore new avenues, they may have to re-examine their thinking. If one accepts the premise that arbitration is a part of the collective bargaining process then the thinking of the arbitrator undoubtedly leaves its impress on the parties.

The only means they have of learning what the arbitrator's thinking is, is through the medium of the opinion.

Grievance Opinions

How about grievances? Where there is a permanent umpire in an industry, it doesn't matter whether the parties request it by contract or explicitly eschew it, the arbitrator will by and large use his discretion as to whether an opinion should be written or should not be written. Where the arbitration is ad hoc, it seems to me that a request by either one of the parties to have a written opinion, should be complied with by the arbitrator.

What is the Purpose of An Opinion?

First: An award must be mutually acceptable. That does not mean that both parties must like it or that either party must be enamored of it. It does mean that both parties must feel that the arbitrator has understood the problem; that he has understood the industry; that his decision has not been alien to the employer and to the employees.

Second: The opinion must show that the arbitrator understood the arguments of the parties. This is particularly true with respect to the losing party. The principals came to the arbitration proceeding convinced that reason and justice would demand that the award go their way. One of them was disappointed. It is imperative particularly that the disappointed party understand that every argument he presented was weighed.

Third: The opinion may very frequently be used as a vehicle to convey what the arbitrator does *not* intend to award.

Fourth: The opinion, if well written and reasoned, can be of assistance to the parties in their future bargaining. A competent arbitrator may be able to develop a fresh approach and a more fundamental analysis so that future related problems are more easily adjusted.

Fifth: The opinion may have an impact on collective bargaining in the hinterland. A clause in a collective bargaining agreement in New York, Philadelphia, Chicago will be construed in one way and the identical clause will be construed differently in Martinsburg, West Virginia or in Honesdale, Pennsylvania.

Arbitrators have written opinions construing various clauses in collective bargaining agreements. In the areas where bargaining is

still new it is imperative that the benefit of the experience of employers and employees who have lived, over a period of years, with these clauses be given to these newly organized industries. The arbitrator's opinion can play a major role in achieving that objective.

When Should the Opinion Be Written?

There are some who insist that the opinion must be written at a particular moment. Usually that fleeting and elusive moment is the moment before the arbitrator utters the award. Otherwise, it is contended, the opinion is a mere rationalization of an award that has already been arrived at. This approach has recently been "sanctified" by the New Jersey Supreme Court[2] in one of the worst reasoned opinions that has been handed down in a labor case in recent years. The Court set down the exact time that the arbitrators must write their findings of fact, their decision and their award.

I don't think there is any magic in selecting any particular moment as to when the opinion should be written. The emphasis, rather, ought to be placed on who the arbitrator is. If he is a person who understands, he will be able to write the opinion before or after the award and it will achieve the same objective.

Should Opinions Be Published?

There has been a good deal written on that subject. Some have been vigorous in their advocacy of the publication of opinions. Others have been vehement in their denunciation of the practice. This has been particularly true since a number of publishers have undertaken to distribute arbitrators' opinions.

Leo Cherne, the Executive Secretary of The Research Institute of America, unqualifiedly opposes the publication of opinions.[3] Theodore Kheel, on the other hand, is unqualified in his enthusiasm for publication.[4] I subscribe to neither notion. As indicated before, publication may very well be a matter for the parties themselves to

[2] In the matter of Arbitration between New Jersey Bell Telephone Company and Communications Workers of America, N. J. Division, No. 55, CIO, Supreme Court of New Jersey, 5 N. J. 354, 75 A. 2d 721 (1950).

[3] Leo Cherne: Should Arbitration Awards Be Published, Arbitration Journal, N. S. Vol. 1, p. 75 (1946).

[4] Theodore Kheel: Reporting of Labor Arbitration; Pro and Con, *ibid.*, p. 424.

determine. On the other hand, there is no point in keeping arbitration awards a deep, dark secret.

We have maintained a rule in arbitration proceedings that the rules of evidence do not apply. Almost anything may be introduced by either party. If that rule is to hold true, how are we going to withhold the introduction of arbitrators' opinions? And why? The fear and apprehension are predicated on the fact that the arbitrator will be influenced by the opinion.

If he is unduly influenced by it, he isn't very much of an arbitrator. He wouldn't render a good award under any circumstances. The course to be followed is the elimination of the arbitrator rather than the elimination of the published award or opinion.

The parties expect the arbitrator to see all of the facts. If after having examined the particular situation and having familiarized himself with all of its nuances, the arbitrator then analyzes an opinion by another arbitrator in an identical or in a similar situation, there is no harm in that. It is absurd to shut the door on one particular source of evidence because it may be misconstrued.

Can We Or Should We Develop A Common Law of Arbitration?

Some industries have already developed a common law. That is true of the Hosiery Industry.[5] Even though the collective bargaining clauses in the Mens' and Ladies' Garment Industries differ the end result is the same.[6]

Professor McPherson is quite dogmatic in his opposition. It is his opinion that the imposition of common law doctrines would hamstring and ultimately destroy arbitration.[7]

I don't think we can be dogmatic about it. First, we already have a common law. I have pointed out what the rule is in the Hosiery Industry. There the parties have developed a body of precedent. They deliberately incorporate the decisions of arbitrators into their collective bargaining contract. Other industries having permanent umpires have adopted similar techniques. Industries that arbitrate the terms of new agreements have developed decisions which both

[5] Page 62, National Agreement, Full Fashion Hosiery Industry.

[6] Sol A. Rosenblatt, The Impartial Machinery of the Coat and Suit Industry, Arbitration Journal, Vol. 3, p. 224 (1939).

[7] William H. McPherson: Should Labor Arbitrators Play Follow the Leader? Arbitration Journal, N. S., Vol. 4, pp. 163, 166, 167 (1949).

parties cite either with approval or disapproval. That is true in the Printing Trades, the mass Transportation Industry and in the Railroad Industry.

That does not mean slavish adherence to precedent. As Samuel Jaffe, Arbitrator, has aptly put it, "The arbitrator's decision is final and binding but not eternal". It seems to me that there has been a misconception of the role of precedent. Justice Cardozo, in his volume on "The Nature of the Judicial Process", discussing the role of precedent, states:

> "But I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment..." It is thus great writers upon the common law have discovered the source and method of its growth, and in its growth found its health and life. It is not and it should not be stationary. Change of this character should not be left to the legislature. If judges have woefully misinterpreted the mores of their day, or if the mores of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors."

Of course, the tempo in arbitration is more rapid. Arbitration is a more sensitive process. It is more responsive to change.

Common law is premised on the publication of all Appellate Court Decisions. There are about 30,000 of those Decisions published annually in the United States. There is no Appellate Court insofar as the arbitrator is concerned. His decision is final and binding. Not all arbitrators' opinions are published. As a matter of fact, only a small minority are published. The common law is not concerned with the wishes of the parties. Arbitration is exclusively concerned with their wishes. The common law is the law for all citizens. Arbitration is the law for one particular group of individuals in one factory at one elusive moment in their industrial history. It takes an Appellate Court to reverse the common law. It takes the parties to reverse an award handed down by the arbitrator. Power, in the one instance, is retained by the judiciary; in the other, by the litigants. The arbitrators who wistfully hope to substitute

precedent for ingenuity, resourcefulness and knowledge are courting destruction. Advocates who seek to replace common sense and justice with specious precedent are impairing the arbitration process.

Arbitration is constantly presenting new problems. The decision that was handed down yesterday and was perfectly fair, may be found to be unworkable tomorrow. The parties will recognize it through collective bargaining and the arbitrator will have to recognize it through his opinion and award. He may find no precedent for it. He may find nobody who uttered it.

Within these limitations, however, it must be recognized:

1. That the opinion of arbitrators voluntarily selected by the parties must be studied and given consideration. This is done today where the umpire is permanent. There is no harm in having it done where the umpire is ad hoc.

2. Where the terms of new agreements are being arbitrated the rationale, the philosophy and the social perspective of the arbitrator are important. There is no harm in having the present arbitrator know what the thinking of his predecessors has been. There is no injury done by familiarizing him with what other arbitrators have said and thought in similar situations. That does not mean that he must blindly adhere to it. It does not mean stare decisis and res adjudicata.

The purport of what I have tried to say is that a great burden is imposed upon the parties to the arbitration process. The parties, include the employers, the unions and the arbitrators who are called in by them to resolve whatever conflicts they are unable to adjust amicably.

There is no definite formula for opinions and awards. It depends on the parties. However, an opinion may be extremely helpful under certain circumstances.

Conclusion

The opinion is an organic part of the arbitral process. It constitutes material with which the edifice is erected. The opinions are the working papers which ultimately result in the award. They are the key to our social and economic thinking. They are the guide to a determination as to who the arbitrator is and what he does. As collective bargaining develops, so students will pay more and more attention to arbitrators' opinions. It must of necessity be so.

Sales Distribution Agreements*

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MANY international sales-distribution agreements provide for arbitration of controversies as a means of avoiding the economic loss entailed in litigation. To litigate often involves a slow, protracted process. In many states in the union, court calendars are two, three or even more years behind and similar delays exist in countries outside the United States. This is of course a most undesirable situation and often precludes justice. When one considers as well the artificial rules which control pleading, practise and evidence, it is frequently impossible to see how the true equities of a situation can be presented for proper determination.

Arbitration provides an easy, inexpensive and expeditious method of deciding the rights of the parties. In many situations the availability of arbitration (with its speedy awards) discourages controversy, but even more important is the fact that while arbitration is functioning, a contract may continue operative. Such a consideration is particularly important in a long term manufacturer-distributor arrangement, inasmuch as litigation is almost always accompanied by a rupture of relationship.

For the reasons briefly sketched above, provisions for arbitration appear with increasing frequency in agreements. Care should be taken however to verify that what is sought, is in fact achieved. The laws of different jurisdictions vary with respect to the type of controversy which can be submitted to arbitration. The machinery for arbitration set out in the agreement should be clear and effective, and the matters subject to arbitration plainly described. In a controversy between persons operating in different countries, consideration should be given to sovereignty matters and practises. Where the arbitration is to be held, under whose auspices and rules, how

* Reprinted, with permission, from an article in International Markets (published by Dun & Bradstreet, Inc., New York), January 1951, p. 10.

arbitrators are to be selected—all are necessary provisions in agreements looking to arbitration. Awards must be final and enforceable through reduction to judgment. If arbitration is to be the governing principle, proper draftsmanship should leave no room for litigation to preclude a resort to arbitration.

It would be well to note the willingness of the American Arbitration Association to be of help in crystalizing thinking with respect to arbitration. It would be helpful to review this aspect of the projected agreement with the Association before it is executed.*

* One cannot leave the subject of arbitration without reference to an ancillary matter. Suppose that the manufacturer has a satisfactory provision for the arbitration of any controversy which may arise. If the product which he is selling to his distributor is made up of parts which the manufacturer purchases from others, he should have a parallel agreement calling for arbitration, with his own suppliers. Such parallel agreement will facilitate the speedy resolution of the rights of all the parties.

The Distribution of Gold looted by the Germans from Rome, Italy in 1943 was claimed by both Albania and Italy. The Gold Commission established by the Governments of France, Great Britain and the United States to distribute gold recovered from the pool previously looted by Germany, had been unable to reach a conclusion. The situation was further complicated by the fact that this case was connected with the British claim to the same gold in vew of the Corfu Channel Settlement. On April 25, 1951 the three governments reached an agreement (State Dept. Bull. vol. 24, p. 786) which provided for the submission of this dispute to an arbitrator to be designated by the President of the International Court of Justice. This arbitrator is to be an eminent and impartial jurist, who will furnish his advice on the claim submitted to him "in the form of fully reasoned opinion." The arbitrator is moreover authorized to "determine all questions of procedure including the manner and the time limits within which evidence and observations may be submitted to him by any government entitled to do so."

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under the main headings of: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

Reference to Rules of the New York Produce Exchange in a contract for the sale of peanut oil amounts to an agreement to submit to arbitration proceedings before the Arbitration Committee of the New York Produce Exchange. "The agreement to arbitrate, which was signed by the respondent, may be considered as a request that the arbitration committee of the New York Produce Exchange on vegetable oils, waxes and fats, function in the event a controversy arises between the parties." *C. F. Simonin's Sons, Inc.* v. *Antonio Carrao Corp'n,* N.Y.L.J., March 12, 1951, p. 882, Arkwright, J.

The existence of an agreement with an arbitration clause contains "the basis for compelling arbitration and any revocation or nullifying acts appearing thereafter are for the arbitrator to determine (*Lipman* v. *Haeuser Shellac Co.,* 289 N.Y. 76)." *P. Beiersdorf & Co., Inc.* v. *Duke Laboratories, Inc.,* N.Y.L.J., April 6, 1951, p. 1251, Hecht, J.

Fine print arbitration clause which was contained in a rug cleaning contract binds a party "whether or not she was aware of its presence in the body of the paper which preceded her signature (*see Matter of Liberty Country Wear, Inc.,* 197 Misc. 581)." *Goldman* v. *United Rug & Carpet Cleaners Corp'n,* N.Y.L.J., March 19, 1951, p. 980, Nova, J.

"**The effect upon a contract** containing an arbitration clause, of events subsequent to the making of the contract, ordinarily presents questions to be determined by the arbitrator rather than by the court (*Matter of Lipman,* 289 N.Y. 76, 80)." *In re Sun Rubber Co.,* N.Y.L.J., January 24, 1951, p. 295, Botein, J.

A partnership agreement provided that if on dissolution, either at expiration of term or at any other time, the parties failed to agree upon the division of assets, arbitrators should devise the way and manner of the division. A dispute arose as to the right of the surviving partner to purchase the decedent's share of the enterprise, a drugstore, and the price he should pay therefor. Since the partnership agreements provided elsewhere for the accounting, with a legal representative, of the estate of the deceased partner and for the payment of the sum found due without referring to arbitration, the representative of the deceased partner could not be compelled to arbitrate the question of price.

"There is nothing in the entire agreement to indicate that the arbitration clauses were to be projected into the type of dispute with which the parties are now faced." *Televitch* v. *Rosenshine,* 102 N.Y.S. 2d 3, Hallinan, J.

Wholly-owned subsidiary of party, as a separate and distinct entity, may not be requested to submit a controversy to arbitration under a factoring agreement to which it was not a party. *Dognin* v. *I. Zendman, Inc.,* N.Y.L.J., March 22, 1951, p. 1033, Dineen, J.

Attorney's affidavit on an agreement (in the form of an invoice) was obviously based upon hearsay and did not present "any evidentiary facts sufficient to raise a triable issue as to the making of the agreement to arbitrate (*Matter of Bernstein,* 176 Misc. 563)." *United Rug Cleaners Corp'n* v. *Goldman,* N.Y.L.J., January 19, 1951, p. 245, Murphy, J.

Merger of Local 906 U.O.P.W.A. with District 65 D.P.O.W.A. and loss thereby of its identity and existence does not prevent submission to arbitrator of a dispute arising out of or in connection with the contract with Local 906 which is being conceded. *Friedman* v. *Union News Co.,* N.Y.L.J., March 27, 1951, p. 1087, Dineen, J.

Employment contract for office manager for one year which provided that "each of its provisions shall remain in full force and effect as long as the employee continues in his position" was not intended as a limitation of the (broad) arbitration clause, but was intended to cover a renewal or other continuance of the employment after the expiration of the one-year term of the contract." App. Div. Second Dept. thus reserved an order which had denied the stay of a court action for wrongful discharge until arbitration had been had in accordance with the terms of the contract. *Berens* v. *Robineau,* 278 App. Div. 710, 103 N.Y.S. 2d 168.

Employee cannot oppose a motion to stay proceedings pending arbitration with the contention "that the arbitration clause was intended to bind only the employer and the union (*Sperling* v. *Newtown Laundry Service, Inc.,* 264 App. Div. 878, 35 N.Y.S. 2d 588)." *Ott* v. *Met. Jockey Club,* N.Y.L.J., April 9, 1951, p. 1280, Hallinan, J.

II. THE ARBITRABLE ISSUE

Custody of children is not an arbitrable issue since "parents can never finally contract with respect to the custody of their children. Over these the court has jurisdiction, regardless of the agreement of the parties. . . . The determination of the custody of minor children residing in this state is the function and prerogative of the Supreme Court as representing the sovereignty of the state which stands in the relation of parens patriae to such minor children. . . . The dominant factor in determining the question of custody is the welfare and best interest of the child." The court said further: "There may be an ever widening field of usefulness for arbitration in commercial controversies and it may be a practical, efficient and expeditious way to settle a multitude of disputes and disagreements, but as was so aptly stated by the late Mr. Justice McLaughlin in withholding approval from an arbitration award: "* * * such matters as the custody of a child and the right of visitation are not properly the subject of arbitration, depending for their determination upon a

judicial finding as to the best interests of the child (*Waltman* v. *Waltman*, N.Y.L.J., January 15, 1940, p. 221)." *Hill* v. *Hill*, N.Y.L.J., May 3, 1951, p. 1623, Valente, J.

Return of piece goods under an agreement which obligates a corporation to manufacture solely and exclusively for the account of the other party is an arbitrable issue under a clause for "disputes under this agreement," since the latter must be deemed "to have impliedly agreed to furnish the corporate petitioner with the merchandise which said petitioner was to manufacture into finished articles (*Wood* v. *Lucy Lady Duff-Gordon*, 222 N.Y. 88)." *Cotton Products, Inc.* v. *Joan Iris Corp'n*, N.Y.L.J., January 22, 1951, p. 259, Botein, J.

Where, in an action instituted by the administratrix of an estate, there is "no basis for the claim of dispute which would warrant resort to arbitration," an order granting a motion to proceed to arbitration was reversed by the App. Div. Second Dept. *Fleischer* v. *Borus*, 103 N.Y.S. 2d 411.

Christmas holidays and proper method of computing the forty hours in the work-week to determine overtime pay when one of the two specified holidays fell on Sunday, came within the scope of an arbitration clause specifically providing that any dispute as to the interpretation or application of any of the provisions of the collective bargaining agreement should be submitted to an arbitration board. Said the Supreme Court of North Carolina in affirming the judgment sustaining the award: "Settlement of disputes between labor and management by means of fair and intelligent arbitration is to be commended, and the result will be upheld by the Courts when within the scope of the collective bargaining agreement and the terms of submission. Said Justice Ashe in *Robbins* v. *Killebrew*, 95 N.C. 19: 'The policy of the law is in favor of settlements by arbitrators, and their awards should be sustained whenever it can be done consistently with the rules of law.'" *Thomasville Chair Co.* v. *United Furniture Workers of America, Local 286*, 62 South Eastern Reporter Second Series 535, Devin, J.

Damages for union's breach of its non-strike pledge was considered within the scope of the arbitration clause of a collective bargaining agreement which provided that "all grievances, complaints, differences, or disputes arising out of or relating to this agreement, or the breach thereof, shall be submitted to arbitration by either party," if not adjusted by the established grievance machinery. The damage question was therefore an issue referrable to arbitration within the meaning of sec. 3 of the U. S. Arbitration Act permitting the stay of trial until arbitration had been had. Said the U. S. District Court S.D. New York: "The exception in Section 1 was intended to avoid the specific performance of contracts for personal services in accordance with the traditional judicial reluctance to direct the enforcement of such contracts and it was not intended to apply to collective labor agreements. (*United Office & Professional Workers of America, C.I.O.* v. *Monumental Life Insurance Company*, D. C., 88 F. Supp. 602). The purpose of the Labor-Management Relations Act of 1947, 29 U.S.C.A. paragraph 141 et seq. is to bring about peaceful solutions of labor disputes without recourse to industrial strife. Where the parties manifest a purpose to dispose of their disputes by arbitration rather than resort to the use of economic force or pressures, their agreements should be liberally construed with a view toward the encouragement of arbitration. *Kulukundis Shipping Co.* v. *Amtorg Trading Corp.*, 126 F. 2d 978. The Courts should be reluctant 'to strike down a clause which appears to promote peaceful labor relations rather than otherwise.' (*Shirley-Herman Co.* v. *International Hod Carriers*, 182 F. 2d 806, 810). The granting of a stay through

the interpretation here placed upon the Arbitration Act is in accordance with these policies." *Lewittes & Sons* v. *United Furniture Workers of America, C.I.O.*, 95 F. Supp. 851, Weinfeld, D. J.

Scheduled lunch hours was an arbitrable issue under a broad arbitration clause of a collective bargaining agreement, since the submission of " 'any dispute arising out of this contract clearly includes all acts by the parties giving rise to issues in relation to the contract, except the making thereof. Such issues are within the exclusive jurisdiction of the arbitrators, and include any dispute arising out of its construction, and a difference between the views of the parties is to be determined by the arbitrators (*Lipman* v. *Haeuser Shellac Co.*, 289 N.Y. 76; *C. Itoh & Co.* v. *Boyer Oil Co.*, 181 App. Div. 881).' " *United Pencil Workers Local Industrial Union, Number 934, C.I.O.* v. *Niagara Box Factory, Inc.*, N.Y.L.J., March 20, 1951, p. 994, Eder, J.

Failure to reemploy stewards found by the arbitrator to be entitled to reemployment renders the employer liable for back pay. Such determination of the arbitrator was not disturbed by the court though the controversy submitted to arbitration was only as to whether the stewards should be reemployed by the company. Said the court: "The controversy impliedly conferred upon the arbitrator the right to award back pay to those found by him to have been entitled to reemployment, even in the absence of an express reference to the question of back pay. In this connection it might well be pointed out that nothing can be gained by a separate submission to the arbitrator of the question of back pay, in view of the fact that his interpretation of the agreement as entitling those who should have been reemployed to back pay would result in another award of back pay, which would then be controlling upon the court, since it would be bound by the arbitrator's construction of the contractual provisions." *United Automobile, Aircraft and Agricultural Implement Workers of America* v. *American Machine & Foundry Co.*, N.Y.L.J., January 19, 1951, p. 240, Botein, J.

Whether organizing and unionizing of not less than 75 per cent of all Chinese laundries was a condition precedent to the execution or existence of any labor relations contract containing an arbitration clause, presents a triable issue as to the making of the contract of arbitration. The court further stated that it may be shown by parol evidence "that the parties agreed by parol that the writing in question was not to become effective until the happening of some contingency (*Saltzman* v. *Barson*, 239 N.Y. 332, 337)." *Wing Gong Laundry, Inc.* v. *Laundry Workers Joint Board of Greater New York*, N.Y.L.J., May 21, 1951, p. 1872, Arkwright, J.

Increase of work load of spinning doffers is an arbitrable issue even though the collective bargaining agreement also contains a provision that the arbitrator shall have no power to change or modify its terms. "If a literal interpretation is to be given, arbitration would be but a useless gesture; it would be unnecessary." *Silcox* v. *Juilliard & Co.*, 15 Labor Arbitration 668 (N.Y. Supreme Court, Oneida County).

Assignment of the performance of work to other employees who were not in the bargaining unit was considered an arbitrable issue, although the collective bargaining agreement also contained a management prerogative clause. In negotiations for a renewal agreement the employer had declined to confine such work exclusively to employees in the bargaining unit, and this position had been accepted by the union in the contract agreement as finally executed.

These circumstances, however, were not considered conclusive since many considerations enter into the conduct of such negotiations. The court considered the issue arbitrable, referring to *Local 474, National Food Chain Store Employees, C.I.O.* v. *Safeway Stores, Inc.*, 79 N.Y.S. 2d 493, aff'd 274 App. Div. 779, "bearing in mind always that the prime objective of collective bargaining is the maintenance of industrial peace." *North American Philips Co., Inc.* v *International Association of Machinists, Lodge No. 1709*, 103 N.Y.S. 2d 520, Hofstadter, J.

Liquidation of employer's business and effective termination of collective bargaining agreements are "matters and issues for the arbitrator to decide as questions of fact and law." The employer who participated in the arbitration can no longer claim that the arbitrator lacked jurisdiction to hear and determine the issues; he had a remedy to apply for a stay of arbitration. By participation the party "waived any right to now object that he lacked jurisdiction." *Korman* v. *Dreyer Brothers Home Furnishing Corporation*, N.Y.L.J., March 27, 1951, p. 1086, Eder, J.

Whether a new employee was a "parts manager" and not a "parts man" and therefore excluded from the seniority provisions of the collective bargaining agreement constitutes an issue to be decided by the arbitrator. This dispute before the New York State Board of Mediation concerned the lay-off of that employee by a retail dealer of automobiles. *Aaron Brink Chevrolet Co., Inc.* v. *Amalgamated Union Local No. 259, U.A.W., C.I.O.*, N.Y.L.J., March 14, 1951, p. 924, Beldock, J.

Layoff of employees and assignment of their work to working supervisors is an arbitrable issue under a collective bargaining agreement which provides for arbitration of differences as to the "application" of the terms of the contract, since the application of a contract provision is involved in the setting up a seniority system governing layoffs. *Colt's Industrial Union* v. *Colt's Manufacturing Co.*, Conn. Law Journal, Vol. 17, Number 11, p. 2 (Connecticut Supreme Court of Errors).

The sale by a milk company of one of its milk routes in the City of Hoboken to a person not an employee of the company would constitute the creation of a new craft subject to union jurisdiction which was prohibited by a collective bargaining agreement "except with the joint approval of the employer and the union," is an arbitrable issue since the agreement provided for the arbitration of "any and all disputes and controversies arising under or in connection with the terms or provisions of this agreement, or in connection with or relating to the application or interpretation of any of the terms or provisions hereof." The Court affirmed the judgment directing arbitration which the union had opposed and in referring to *Hudson Wholesale Grocers Co.* v. *Allied Trades Council, A.F.L.*, 3 N.J. Super. 327 (Ch. Div. 1949), stated: "If perchance the arbitrators should determine that the sale in fact create a new craft, the consent of the union to the creation thereof would then be required pursuant to the terms of the contract." *Newark Milk & Cream Co.* v. *Local 680 of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America*, 78 Atlantic Reporter 2d 839 (Superior Court of New Jersey, Appellate Division).

Employer's liability for unpaid wages because of the discontinuance of business and resulting termination of employment is not an arbitrable issue under a collective bargaining agreement which provided for arbitration of

disputes relating to discharges or to wages and working conditions. The court held that the parties did not contemplate or anticipate the discontinuance of business, and that therefore "the arbitration clause dealing with discharges had no relevancy and could not be invoked," referring to *Berger* v. *World Broadcasting System, Inc.*, 191 Misc. 1043, 78 N.Y.S. 2d 528, aff'd 274 App. Div. 788, 2d 195 (1948), and to *B. F. Curry, Inc.* v. *Reddeck*, 194 Misc. 527, 86 N.Y.S. 2d 674 (1949). *Machine Printers Beneficial Ass'n of United States* v. *Merrill Textile Print Works, Inc.*, 78 Atlantic Reporter 2d 834 (Superior Court of New Jersey, App. Div.).

III. ENFORCEMENT OF ARBITRATION AGREEMENTS

Notice of appearance in an action to foreclose a mechanic's lien does not constitute "such a participation in the litigation brought by the plaintiff as to result in a waiver of arbitration (*Haupt* v. *Rose*, 265 N.Y. 108; *Short* v. *National Sport Fashions. Inc.*, 264 App. Div. 284)." *De Lillo Construction Co., Inc.* v. *Minskoff*, N.Y.L.J., April 9, 1951, p. 1280, Daly, J.

Choice to litigate, in North Carolina, one of several claims for the return of unprocessed merchandise must be deemed to be a waiver of the party's right to arbitrate other disputes which had already arisen at the time the action was instituted. The court referred to *Young* v. *Crescent Development Company*, 240 N.Y. 244, where the Court of Appeals said (p. 249) "We do not think that a party having two or more claims against the same party springing out of the same contract ought to be allowed to abandon his right to arbitration in respect of some of these while he insists upon it in respect of others." *Cotton Products, Inc.* v. *Joan Iris Corp'n*, N.Y.L.J., January 22, 1951, p. 259, Botein, J.

Proceeding to have Court fix reasonable rent may not be maintained by tenant in possession under unexpired lease, under which rental had been fixed by a confirmed arbitration award. However, where lease was about to expire, the proceeding would not be dismissed on landlord's motion but would be entertained as though commenced after expiration of lease. (See *Arbitration Journal*, N.S., vol. 4, p. 64 (1949), for digest of decision in same case disallowing attack on the award where confirmation was consented to by both parties.) *In re Quarant*, 87 N.Y.S. 2d 755.

Failure to meet statutory requirements for personal service of demand for arbitration defeated award. Following valid institution of arbitration proceedings regarding discharge of two employees, a demand was served regarding a third, and the proceedings were joined. Court confirmed award with respect to first two discharges, but vacated that part of award dealing with the third employee. Court then remanded the third dispute to Special Term of the Supreme Court for determination whether notice demanding arbitration had been duly served. *United Culinary Bar and Grill Employees* v. *Schiffman*, 299 N.Y. 377.

Bill of lading which was issued in Pennsylvania provided for the settlement of all claims in Norway according to Norwegian law. The exclusion of American courts was considered not invalid since effective remedies in the Norwegian courts cannot be contested and "the instant case is not one where the parties agreed that no court was to hear the grievances of either." *Cerro De Pasco Copper Corp.* v. *Knut Knutsen, O.A.S.*, 187 F. 2d 990 (U.S. Court of Appeals Second Circuit, Frank, C. J.).

Time-limit for demand of arbitration, within ten days after the decision of an architect on the quantity of steel was delivered, "does not constitute a statute of limitations. The contract must be reasonably construed and the demand which was made within a reasonable time (twenty-four days) will be deemed sufficient (*A. B. Barr & Co.* v. *Municipal Housing Authority for the City of Yonkers,* 86 N.Y.S. 2d 765, aff'd 276 App. Div. 981)." *Matter of Constitution Square, Inc.,* N.Y.L.J., January 29, 1951, p. 355, Bailey, J.

Appointment of an arbitrator by court cannot be sought when inconsistent with the institution of an action for temporary injunction and appointment of a receiver. "Plaintiff should either maintain the action or resort to arbitration in lieu thereof." *Bialik* v. *Forman,* N.Y.L.J., March 27, 1951, p. 1092, Nova, J.

Service by mail in a proceeding for an order directing arbitration can only be had when such service has been provided in the agreement of the parties. Since no manner of service was specified in the contract, sect. 1450 C.P.A. requires that the petition and notice of motion be served "in the manner provided by law for personal service of a summons." *Goodman* v. *Zekely,* N.Y.L.J., April 16, 1951, p. 1372, Keogh, J.

Demand for jury trial in a proceeding to stay arbitration under a collective bargaining agreement must be made under the 1948 amendment to sect. 1458 C.P.A., on or before the return day of the application for a stay. *In re Dumont Electric Corp'n,* N.Y.L.J., March 13, 1951, p. 898, Hofstadter, J.

Opposing an application for temporary injunction, though making only a passing reference to the arbitration clause in the agreement attached to and made part of the complaint, may be considered a waiver of arbitration in a dispute on specific performance of an agreement to sell the stock of a corporation. *Bender* v. *Goldberg,* N.Y.L.J., February 28, 1951, p. 729, Murphy, J.

Defendants who refused repeated requests for arbitration prior to the commencement of a court action were denied a stay of action pending arbitration. Even though no formal demand was made to commence arbitration, the defendants indicated their unwillingness to arbitrate. *Beaver Concrete Breaking Co., Inc.* v. *Nadal Baxendale, Inc.,* N.Y.L.J., February 23, 1951, p. 664, Valente, J.

A charter party of the vessel SS Yankee Fighter provided that the "owner of the vessel retains no control, possession or command whatsoever of the vessel during the period of the charter." Since the seizure of the vessel by the owner would deprive the charterer of his right to possession pending arbitration of a dispute on the termination of the charter party, the court has a right to preserve the status quo. In granting a motion to restrain the owner from taking any steps to take possession of the vessel, or to interfere with its operation, the court said that under the U.S. Arbitration Act the Federal courts "are not limited in their equity powers to the specific function of enforcing arbitration agreements, but may exercise those powers required to preserve the status quo of the subject matter in controversy pending the enforcement of the arbitration provision." *Albatross SS Co., Inc. v. Manning Bros., Inc.,* 95 F. Supp. 459 (U.S. District Court, S.D. New York, Weinfeld, D. J.).

Provision in partnership agreement (Jamaica-Richaven Medical Group) that costs and expenses of arbitration for settlement of disputes shall be borne

and paid by the party requesting such arbitration, is considered valid since it has not been "imposed upon a party irregardless of whether or not he is successful in the controversy." Defendant's motion to stay all proceedings until arbitration be had in accordance with the partnership agreement, was therefore granted. *Kalkstein* v. *Landess,* N.Y.L.J., January 2, 1951, p. 131, Colden, J., aff'd without opinion 278 App. Div. 704, 103 N.Y.S. 2d 842.

Examination before trial in arbitration proceedings was again denied on the ground that "such an examination is not in accordance with the procedure in arbitration matters." *Lurie* v. *Cinemart, Inc.,* N.Y.L.J., April 9, 1951, p. 1273, Cohalan, J. (see this Journal 1950, p. 72).

Whether the statute of limitations is a bar to an arbitration proceeding was recently decided for the first time with regard to an agreement of 1928. Said the court: "It appears to me that whether or not the statute has run, a valid agreement exists. The right to enforcement thereof may depend on the limitations question. But unless this is raised the agreement as it stands is enforcible. This being so it follows that the question presented by this statute goes not to the existence of a valid agreement but to the right to enforce the same. This it is held is a question for the arbitrators." *Piatti* v. *Grotta & Co.,* N.Y.L.J., May 3, 1951, p. 1623, Cohalan, J.

Whether buyer's claim was asserted pursuant to a sales contract ("in no event more than one year after date of invoice") is a matter for consideration by the arbitrators. *Packard Fabrics, Inc.* v. *Deering, Milliken & Co.,* 302 N.Y. 643, affirming 276 App. Div. 753, 96 N.Y.S. 2d 878 (see this Journal 1950 p. 228).

A partnership agreement between three partners provided for the settlement of any disputes by arbitration whereby the father and son should select one arbitrator, the brother-in-law a second one and the two arbitrators thus appointed should select the third arbitrator. When a dispute arose the father and the brother-in-law opposed the son. Thus father and son could not agree upon the same man as the contract contemplated. The App. Div. First Dept. therefore held: "In view of this unexpected alignment between the parties we think that the method provided in the contract for the appointment of arbitrators has failed and that the contract should be construed as though no method for appointment were provided therein. However, the arbitration clause should not for that reason be rendered ineffectual, and we think that a single arbitrator should be appointed by the court, as authorized in that contingency by section 1452 of the Civil Practice Act." *Lipschutz* v. *Gutwirth,* 103 N.Y.S. 2d 732.

Failure to comply with a provision for arbitration is a pre-requisite for an order directing arbitration of a dispute as to whether the validity of the extension in 1948 of a collective bargaining agreement was res judicata. Under sect. 1450 C.P.A. the petition therefore must show a demand for arbitration upon the party identical with that in the court proceedings and a refusal by the latter. *Mencher* v. *Armand Fried,* N.Y.L.J., March 13, 1951, p. 898, Botein, J.

Estoppel created by an employer by permitting the employee to continue in his employment as superintendent after knowledge that he was also engaged in another vocation, was "manifestly an issue for the arbitrator to hear and decide, involving a consideration of all the facts and circumstances." *Lewis* v. *Cohen,* N.Y.L.J., April 18, 1951, p. 1411, Eder, J.

Withdrawal of notice of arbitration makes motion to stay arbitration under a collective bargaining agreement unnecessary. *Alfred A. Knopf, Inc.* v. *Livingston,* N.Y.L.J., March 6, 1951, p. 801, Hofstadter, J.

Identical membership of dissolved Local 13 of the International Guards Union entitled successor union with different affiliation to enforce arbitration clause of collective bargaining agreement. "The fact that another organization has applied for certification as representative of the employees in the unit covered by the agreement does not have the effect of invalidating the agreement either as to Local 13, or as to its successor." *Building Service Employees International Union, Security & Protective Employees Union, Local 238, A.F. of L.* v. *Pinkerton's National Detective Agency, Inc.,* N.Y.L.J., January 26, 1951, p. 352, Valente, J.

Compliance with a grievance procedure on layoff of employees who claim vacation pay cannot be determined upon affidavit only, but must, in view of the sharp issues of fact between the parties, be referred to an official referee for determination. *In re Atlantic Basin Iron Works, Inc.,* N.Y.L.J., March 5, 1951, p. 787, Arkwright, J.

Rival union cannot intervene in an action to confirm an award directing the removal of certain employees of apartment building since the rival union was not a party to the arbitration agreement. Said the court: "Stability of labor relations suffers if collective bargaining agreements may be breached and employers called upon to deal with a different union prior to expiration of the existing agreement. While employees may organize and otherwise conduct other labor activity, they remain bound by the terms of the existing agreement." *Dumas* v. *Upland Builders Inc.,* N.Y.L.J., May 8, 1951, p. 1684, Benvenga, J.

An employee asserted that he was no longer a member of the union and that he doubted his ability to enlist the good offices of the union to conduct the dispute on his behalf. The collective bargaining agreement provided for the naming of an arbitrator by the State Board of Mediation. The Board, however, had rejected his request because made by one "not a signatory to a collective bargaining agreement." The court held that the employee was entitled to have his claim determined either by an arbitrator agreed upon by the parties or appointed by the court or, if the employer is unwilling to proceed to arbitration, the employee will be permitted to proceed with court action, which the employer could not stay. *Julius Wile Sons & Co., Inc.* v. *Messinger,* 102 N.Y.S. 2d 862, Hofstadter, J.

IV. THE ARBITRATOR

Disqualification of an arbitrator in a construction dispute may result from the umpire's calling upon a party at its home, which was the subject of the controversy, in the absence of the other members of the arbitration board, the attorneys and the other party, spending in all about two hours on the visit. The matter was referred to an official referee to hear and to determine whether the umpire inspected the disputed work or discussed any of the facts in this matter during his visit. *Cone* v. *Lang,* N.Y.L.J., April 17, 1951, p. 1395, Cuff, J.

In a question of discretion to be considered upon a remission to the Appellate Division (301 N. Y. 616), the court found that "in the exercise of dis-

cretion the matter should be remitted to the same arbitrator rather than to a different one." *Industrial Union of Marine and Shipbuilding Workers of America, Local 39, C.I.O.* v. *Todd Shipyards Corporation,* 278 App. Div. 677, 103 N. Y. S. 2d 129.

Disqualification of an arbitrator because of his previous conviction, which he failed to disclose, for violation of Office of Price Administration regulations, justifies vacating of an award. The court said: "Implicit in the office of judge or office of quasi-judge is the basic requirement and inherent requisite that the incumbent of such office be a person of good character and repute. This is so manifestly indispensable that discussion for its necessity is superfluous; the need is obvious. . . . When he is about to be chosen to serve, the proposed arbitrator or appointee knows, of course, if he has been convicted of a crime, and if such is the fact he is under a moral and legal duty to make such disclosure. This is imperative in order that those upon whom he may pass judgment may, if they are so inclined, register objection, which they cannot do in the absence of such a disclosure. They may not want to trust a person with such a background; they may deem him incapable of being impartial, fair, and honest. They are entitled to such a revelation and it is indispensably essential to a proper administration of law and justice". An award rendered under the arbitration rules of the National Federation of Textiles was therefore vacated. *Knickerbocker Textile Corp.* v. *Leifer Mfg. Corp.,* 103 N.Y.S. 2d 782, Eder, J.

Misconduct of an arbitrator may be found when, in a dispute on damages for failure to pay for the charter of a yacht, it has become doubtful whether the third arbitrator reached his conclusion before or after consulting the attorney. The Supreme Court, New York County, Aurelio, J., upon reargument of a motion to confirm the award of a majority of the arbitrators, referred the parties to an official referee and held in abeyance the determination of the motion to confirm the award, pending report by the referee. The Appellate Division without opinion affirmed. Justice Shientag dissented, stating that "To permit Ryder's affidavit to validate his award would work the destruction of the salutary rule prohibiting arbitrators from delegating to third parties all or part of the duty with which they are entrusted. It would permit an arbitrator to make unauthorized ex parte investigations of material issues, without notice to the parties, provided that he later asserts that he reached his decision prior to that investigation—a statement that the parties are powerless to rebut. It would make the validity of an award dependent upon a subjective mental process. It would create a situation which, consciously or otherwise, would tend to blur the independent operation of the mind of an arbitrator, however well-intentioned he might be. The arbitration policy of this State 'does not call for a relaxation of restraints upon the conduct of the arbitrators in so far as those restraints have relation to the fundamentals of a trial and the primary conditions of notice and a hearing. Indeed, they are most important now than ever, if arbitration is to attain the full measure of its possibilities as an instrument of justice.' *Stefano Berizzi Co.* v. *Krausz,* 239 N. Y. 315, 319, 146 N. E. 436, 437." *Holiday* v. *Samuels,* 278 App. Div. 687, 103 N.Y.S. 2d 338.

Refusal of arbitrators to award damages because there was no proof to support such damages may not justify vacating an award since "it does not appear on the face of the award that the arbitrators have mistaken the law upon which the award is based (see *Fudickar* v. *Guardian Mutual Life Insurance Co.,* 62 N.Y. 392)". *Electron Sound Corp'n* v. *Pacent Eng. Corp'n,* N.Y.L.J., January 17, 1951, p. 204, Valente, J.

Arbitrator's fees when by agreement of the parties the costs of arbitration were to be borne by the losing party, could properly be determined by the arbitrators to the effect that the petitioner be required to pay the costs of arbitration (sec. 1457 C.P.A., *The New York Lumber & Woodworking Co.* v. *Schneider*, 119 N.Y. 475, 482). *Perloff* v. *Bandremer*, N.Y.L.J., January 11, 1951, p. 134, Arkwright, J.

Once the arbitrators or a majority of them have rendered an award, they are excluded from any further function in an arbitration proceeding. Said the U. S. Court of Appeals Tenth Circuit (Oklahoma): "It is a general rule in common law arbitration that when arbitrators have executed their award and declared their decision they are functus officio and have no power or authority to proceed further. (*City of St. Charles* v. *Stookey*, 8 Cir., 154 F. 772; *Citizens Bldg. of West Palm Beach* v. *Western Union Tel. Co.*, 5 Cir., 120 F. 2d 982; Cases Collected in *Pierce Steel Pipe Corp.* v. *Flannery*, 319 Pa. 332, 179 A. 558, 104 A.L.R. 710)". *Mercury Oil Refining Co.* v. *Oil Workers International Union*, 187 F. 2d 980, 983.

V. ARBITRATION PROCEEDINGS

Testimony of some witnesses may be accepted by arbitrators instead of contrary evidence given by others. Said the court: "This is not such an improper exercise of power as renders the award a nullity. Similarly the receipt of evidence relating to another arbitration is not ground for setting aside the award." *Mankin* v. *Paramount Tool & Machine Products*, N.Y.L.J., January 24, 1951, p. 295, Valente, J.

Arbitrator who refused to adjourn the hearing did not act improvidently when no affidavit was submitted, or that of a medical physician in support of the request for adjournment. *Connie Coats & Suits, Inc.* v. *Rosenbloom*, N.Y.L.J., March 27, 1951, p. 1086, Eder, J.

Continuance with arbitration without objection to alleged partiality until after the arbitrators had decided certain of the issues in favor of the other party, is considered a waiver of the party's rights, the court referring to *Newburger* v. *Rose*, 228 App. Div. 526, aff'd 254 N.Y. 546, where it is said on page 528: "Even though the claim of disqualification be substantial, the right to take advantage thereof was waived, because with knowledge of the facts, the respondent failed to make a timely objection." *Perloff* v. *Bandremer*, N.Y.L.J., January 11, 1951, p. 134, Arkwright, J.

Evidence ex parte was received by two arbitrators in the form of a memorandum concerning a dispute for allowances on defective goods. Since the arbitrators considered the evidence as having no bearing on the award, the court saw no reason to vacate the award, citing the case of *Berizzi* v. *Krausz*, 239 N.Y. 315, where "the evidence gathered ex parte by the arbitrator was the very basis of his decision." *Whittenton Mfg. Co.* v. *Moorfield Trading Co., Inc.*, N.Y.L.J., January 5, 1951, p. 57, Benvenga, J.

Perjured evidence furnished the arbitrators by a prevailing party may give reason to set aside an award, though no decision was made on the somewhat disputed question of "whether the word 'fraud' in sec. 10(a) of the U. S. Arbitration Act has a broader scope than that word has when applied so as to

permit a collateral attack on a judgment rendered upon perjured testimony." The U. S. Court of Appeals, Second Circuit held that "if perjury is fraud within the meaning of the statute, then, since it necessarily raises issues of credibility which have already been before the arbitrators once, the party relying on it must first show that he could not have discovered it during the arbitration, else he should have invoked it as a defense at that time. Compare *Johnson* v. *Wells*, 72 Fla. 290, 73 So. 188." In affirming the judgment below which confirmed the award (see this *Journal* 1950, p. 232), the court held that the price of the machine, on which the alleged perjured evidence was given, had a very remote bearing on any issue before the arbitrators. Said the Court: "It would be a surprising innovation if every party objecting to an arbitration award could recall all the witnesses in order to vacate the award on the basis of some evidence alleged to be untruthful which had but a remote and speculative bearing on the issues before the arbitrators." *Karppinen* v. *Karl Kiefer Machine Co.*, 187 F. 2d 32, Augustus N. Hand, C. J.

Claim for damages arising out of a contract for the construction of a building was referred, in a court action, to a special master. The party stipulated that he should act as arbitrator and his report of findings should be submitted to the District Court for the City and County of Denver, Colorado, who should thereupon make his conclusions of law and enter proper judgment. The Supreme Court of Colorado held that the arbitrator assumed only functions of the trial of fact and the arbitration was not the ordinary common law arbitration in lieu of an adjudication in court. This right to have the questions of law referred to decision by the court postulated the right to be heard on such questions before the court. Since the record disclosed that the party was foreclosed of hearing by the trial court on his objections to the report of the arbitrator, the case was remanded that the trial court hear and impartially determine any questions of law which may be raised by the party in connection with the arbitrator's report. *Zelinger* v. *Mellwin Construction Co.*, 255 Pacific Reporter 2d 844, Stone, J.

VI. THE AWARD

Motion to vacate an arbitration award is a special proceeding authorized by statute, Conn. Gen. Stat. 1949, sec. 8161 (*Pratt, Read & Co.* v. *United Furniture Workers*, 136 Conn. 205, 210, 70A 2d 120), and is "not controlled by the formal requirements for service of process." Said the court: "The parties to an arbitration set up their own tribunal and rules of procedure (*In re Curtis-Castle Arbitration*, 64 Conn. 501, 511, 30 A. 769)." *Boltuch* v. *Rainaud*, 77 Atlantic Reporter 2d Series 94 (Supreme Court of Errors of Connecticut).

Accounting dispute submitted to arbitration only for ascertaining amount due August 1, 1950 led to an award which confined itself to ascertaining the definite amount. A judgment to be entered upon such an award could not be made a money judgment, as sought by the party, which would moreover direct modifications of the chattel mortgage and notes to conform to the award, since these matters were not committed to the determination of the arbitrators. *Bartels* v. *Period Wood Works, Inc.*, N.Y.L.J. March 7, 1951, p. 821, Hofstadter, J.

Fair rental award made under the assumption that premises were to be used as commercial space, and confirmed by order of Supreme Court, is not binding on Municipal Court in action regarding the use of the premises as apartment. *Chast Realty Corporation* v. *Frost*, 198 Misc. 814, Lyman, P.J.

Fair rental award rendered under Emergency Rent Control Laws could not be attacked by the tenant in a plenary action for recovery of what is alleged

to be excessive rent paid to the landlord. No judgment can be had declaring the arbitration proceeding null and void where the tenant had not at any time applied by motion for a court order vacating the award, as required by sec. 1463 C.P.A. ("within three months after the award is filed or delivered"). In referring to *Heidelberger* v. *Cooper,* 300 N.Y. 502, the Court of Appeals unanimously reversed an order of the Appellate Division and affirmed the ruling made at Special Term which had maintained the validity of the arbitration proceedings. *Raven Electric Co., Inc.* v. *Linzer,* 302 N.Y. 188. The same viewpoint was maintained in *Feinberg* v. *Barry Equity Corp.,* 302 N.Y. 676. That the validity of the arbitration proceedings may not be questioned after the expiration of three months from the filing of the award, has recently also been affirmed in *Airways Supermarket, Inc.* v. *Santone,* 277 App. Div. 722, 102 N.Y.S. 2d 649.

Reinstatement of social workers on condition that they dissociate themselves from outside private practice does not constitute a definite award as required by the California Arbitration Statute (sec. 1288, Code Civ. Proc.). The award, which was rendered under a submission of the parties, did not definitely determine whether the employment was terminated in accordance with, or in violation of the contract, and was therefore vacated. *Lusher* v. *Federation of Jewish Welfare Organizations,* 16 Labor Arbitration 340 (California Superior Court, Los Angeles County).

Preliminary injunction may be had to require an employer to abide by an arbitration award since a refusal to abide by the award is a "violation of contract" within the meaning of section 301 (A) of the Labor-Management Relations Act which authorizes suits for violations of contracts between an employee and a union. The U. S. District Court, Middle District of North Carolina, held that the aforementioned provision creates a federal remedy which is not controlled by state law. *Textile Workers Union* v. *Aleo Mfg. Co.,* 15 Labor Arbitration 726. (Note: The North Carolina legislature meanwhile enacted an amendment to art. 4A of Chapter 95 of the General Statutes providing for the enforcement of future arbitration clauses in labor-management contracts, see *supra* p. 102.)

An ex-employee who was a member of the Laundry Workers Joint Board of Greater New York, A.C.W.A., C.I.O., at the time the collective bargaining agreement between his former employer and the union was executed, cannot oppose a money award rendered against him for alleged damages. *Richmond Hill Laundry* v. *Eiscle,* N.Y.L.J., February 1, 1951, p. 407, Hallinan, J.

Arbitrator's award barring picketing by former members of a union which was bound to a non-strike clause and subject to the settlement of all disputes by arbitration, was confirmed by the court who stated: "It is true that picketing is not illegal merely because its purpose is to induce or cause a breach of an existing contract if workers are engaged in an effort to organize through a rival union in order to better their conditions. Incidental injury to the employer resulting therefrom will not justify the stringent relief of an injunction (*Stilwell Theatre, Inc.* v. *Kaplan,* 259 N.Y. 405). Constitutional guarantees afford to the workers the fullest opportunity to bring their grievances concerning terms and conditions of employment to the attention of the public. However, these rights and privileges may be curtailed and limited by prior agreement between the parties (*Suffridge* v. *O'Grady,* 84 N.Y.S. 2d 211). Such a permissible agreement of limitation is an agreement which provides for the arbitration of all disputes arising under a collective bargaining contract (*Mencher* v. *B. & S. Abeles and Kahn,* 274 App. Div. 585." *Wholesale Laundry Board of Trade, Inc.* v. *Tarrullo,* 103 N.Y.S. 2d 23, Aurelio, J.

Award for issuance of free passes to wives of employees of street railway, in consideration of acceptance of a smaller increase in wages, is invalid because of violation of art. 17, sec. 8 of the Pennsylvania Constitution that no transportation company shall grant free passes "to any person except officers or employees of the company and clergymen". *Johnstown Traction Company* v. *Amalgamated Association of Street, Electrical Railway and Motor Coach Employees,* 15 Labor Arbitration 516 (Pennsylvania Court of Common Pleas, Cambria County).

An award was not considered definite when the arbitrators directed the reclassification of a discharged employee and his reemployment by the company without designating what that employment should be ("such employment as he is competent and capable of doing"). The award did not meet the requirements necessary to make it effective, the U. S. Court of Appeals Tenth Circuit (Oklahoma) stating: "Arbitration is designed to settle controversies and disputes between parties by a method other than through the regularly established tribunals of justice. Its purpose is to eliminate future disputes and litigation. To accomplish this, decisions arrived at by arbitrators must be final and complete and leave no doubt as to the manner in which they are to be made effective. The award need not be in technical or exact language but certainty is an essential and indispensable element to its validity. It must be sufficiently definite that only ministerial acts of the parties are needed to carry it into effect. 3 Am. Jur., Arbitration and Award, Sec. 125; 6 C.J.S. Arbitration and Award, paragraph 84, p. 231; *Baldwin* v. *Moses,* 319 Mass. 401, 66 N.E. 2d 24; *McInnish* v. *Lanier,* 215 Ala. 87, 107 So. 377; *In re E. A. Laboratories,* 50 N.Y.S. 2d 222; *Albert* v. *Goor,* 70 Ariz. 214, 218 P. 2d 736." *Mercury Oil Refining Co.* v. *Oil Workers International Union, C.I.O.,* 187 F. 2d 980.

Express stipulation that arbitrating parties "be entitled to and shall receive a full affirmative money award", was not complied with by an award which determined that the buyer of the business had not sustained his claim for damages, which resulted from the alleged breach of contract. The court corrected the award to the effect that the full unpaid balance of the purchase price was to be paid to the seller. *Perlowin* v. *Perlowin Studios, Inc.,* N.Y.L.J., March 19, 1951, p. 976, Eder, J.

Rights of retention of professional navigators were considered in an arbitration concerning the future status of the entire non-pilot navigator class. An award whereby the company should not be required to retain these employees except "for work in accordance with the established practice as ground instructors in navigation," was confirmed by the courts, distinguishing *Steeves* v. *American Mail Lines,* 154 F. 2d 24 (1946), where a bonus granted by the Maritime War Emergency Board throughout the industry to shipwrecked, interned and later repatriated seamen, was not intended to supersede the larger bonus for which the seamen in question had contracted with their employer. Said the Court: "In the quite different circumstances of the present case, it is a proper conclusion that an arbitration of the future employment status of a specified group of employees of a particular employer was intended to and did supersede contractual claims of certain members of that group which were disputable and unclear, whatever their ultimate fate at law might have been had not arbitration intervened." *Charman* v. *Pan American Airways,* 16 Labor Arbitration 496 (U. S. Court of Appeals, Ninth Circuit, San Francisco, Hastie, C.J.).

Publications

Inter-American Juridicial Year Book, 1949. This publication of the Department of International Law and Organization of the Pan-American Union presents, in articles and notes, a survey of recent developments in inter-American legal relations. It includes a substantial amount of pertinent documentation among which references to inter-American settlement of controversies will be of special interest (Washington: Pan American Union, 1950, 389 pp., $3).

Industrial Relations Year Book, 1951. The first annual edition by Bernard Seltzer is a supplement to the Dartnell Industrial Relations Handbook. It describes current movements in industrial relations and educational contributions in college and university research and includes directories ("Who's Who in Industrial Relations") and a bibliography 1940 to 1950 (Chicago: The Dartnell Corporation, 1951, 224 pp., $5).

Readings in Labor Economics and Industrial Relations. Edited by Joseph Shister. This publication by the Chairman of the Department of Industrial Relations of the University of Buffalo, N. Y., is an extremely interesting collection of articles of recent date, a large proportion of which deal with collective bargaining agreements. An appendix contains "Questions for Study and Discussion." The procedural aspects which the problems involve offer many possibilities for integrating questions of arbitration and other forms of settlement of grievances in the study of labor-management relations (Philadelphia: J. B. Lippincott Co., 1951, 662 pp.).

Labor-Personnel Index, 1951. This new loose-leaf publication, which indices a great number of periodicals among them numerous consumer and trade magazines, offers a reliable reference work with interesting source material and short and pertinent digests. Both arbitration and the functions of arbitrators are well covered (Detroit: Information Service, Inc., 1951, Annual subscription $25).

International Court of Justice Year Book, 1949-1950. The report on the jurisdictional and administrative activities of the Court contains, as in previous years, a valuable bibliography, including Pacific Settlement of International Disputes, Arbitration and Judicial Decisions (International Documents Service, Columbia University Press: New York, 1951, 193 pp.).

The Commerce of Nations, J. B. Condliffe. This well-known author of many publications on international economic questions, at present Professor of

Economics at the University of California, traces today's trade problems to their historical origin and development. He deals among other things, with the impact of war on the economy of various countries, rising nationalistic tendencies and the framework of a world order as created by the Bretton Woods Monetary Agreements. Charts and an extensive bibliography (pp. 848-866) facilitates further research on these timely topics (New York, W. W. Norton & Company, 1950, 884 pp. $7.50).

Documents on German Foreign Policy 1918-1945: Volume III, Germany and the Spanish Civil War 1936-1939. This collection from the Archives of the German Foreign Ministry contains in its chronological narrative a most revealing picture of the non-intervention of the Powers and the events which led to the end of the war (Washington, D. C.: Department of State Publication 3838, 1950, 951 pp., $3.25).

A Commentary on the Charter of the United Nations, Norman Bentwich and Andrew Martin. The British authors summarize the various documents relating to the activities of the United Nations in their practical application and outline very concisely in Chapter VI the topic of "Pacific Settlement of Disputes." Short notes supplement the interesting presentation of timely issues (New York: Macmillan Company, 1950, 239 pp., $2.75).

A Practical Manual of Standard Legal Citations, Miles O. Price. This most valuable contribution of the Librarian of the Columbia University Law Library, in its second printing (January, 1951) will become the authority for legal references, a must for all those concerned with correct citations (New York: Oceana Publications, 1950, 106 pp., $2).

Foreign Relations of the United States, 1934: Volume III, the Far East, and Volume IV, the American Republics. This diplomatic documentation of the fateful years of rising totalitarian powers concerns itself repeatedly with the efforts to maintain good relations between the community of nations, especially in the Western Hemisphere through the settlement of the Chaco dispute between Bolivia and Paraguay (vol. IV, pp. 32-299), and stresses again the necessity for the use of efficient machinery for peaceful adjustment of international controversies (Washington, D. C.: Department of State Publications 4011 and 4089, 1950 and 1951, 868 and 640 pages, $2.75).

Commercial Treaty With Colombia

The Treaty of Friendship, Commerce and Navigation between the United States and Colombia of April 26, 1951 contains a provision for the enforcement of commercial arbitration agreements between nationals and companies of both countries and of awards rendered in arbitration proceedings, similar to art. X of the Treaty with Ireland of January 21, 1950 (this *Journal* 1950 p. 42). The text of the enforcement provision of art. V (2) of the Treaty with Colombia is as follows:

> "Contracts entered into between nationals and companies of one Party and nationals of the other Party, that provide for the settlement by arbitration of controversies, shall not be deemed unenforceable within the territories of either Party merely on the grounds that the place designated for the arbitration proceedings is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party. No award duly rendered pursuant to any such contract, and final and enforceable under the laws of the place where rendered, shall be deemed invalid or denied effective means of enforcement within the territories of either Party merely on the grounds that the place where such award was rendered is outside such territories or that the nationality of one or more of the arbitrators is not that of such Party."

Colombia is the only Latin American Republic which had already made a big stride in the promotion of modern commercial arbitration, by enactment of its law No. 2 of February 28, 1938 providing for the enforcement of future arbitration clauses (for a translation see *International Arbitration Journal,* 1945, p. 212). Again, Colombia, in this Treaty of April 26, 1951 has paved the way for an increased use of commercial arbitration in the settlement of Inter-American trade disputes.